

**Exhibit 3**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

In Re:

THE FINANCIAL OVERSIGHT AND  
MANAGEMENT BOARD FOR PUERTO RICO,

as representatives of

THE COMMONWEALTH OF PUERTO  
RICO, et al,

Debtors

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THE BANK OF NEW YORK MELLON,

Plaintiff

v.

PUERTO RICO SALES TAX  
FINANCING CORPORATION  
(COFINA), et al,

Defendants

No. 17 BK 3283-LTS

Pages 1 - 94

Adv. Proc.  
No. 17-133-LTS in  
17 BK 3284-LTS

HEARING

BEFORE THE HONORABLE JUDITH GAIL DEIN  
UNITED STATES MAGISTRATE JUDGE

United States District Court  
1 Courthouse Way, Courtroom 18  
Boston, Massachusetts 02210  
August 22, 2017, 1:04 p.m.

DEBRA D. LAJOIE  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 3-209  
Boston, MA 02210  
(617)933-5266

1 A P P E A R A N C E S:

2 LUC A. DESPINS, ESQ., Paul Hastings, LLP, for  
3 Official Committee of Unsecured Creditors of the  
Commonwealth of Puerto Rico.

4 MARTIN J. BIENENSTOCK, ESQ., Proskauer Rose LLP,  
5 for the Financial Management and Oversight Board for  
Puerto Rico.

6 RICHARD LEVIN, ESQ., Jenner & Block LLP, for the  
7 Retirees' Committee.

8 PETER FRIEDMAN, ESQ., O'Melveny & Myers, LLP, 7  
9 Times Square, New York, NY 10036, for FOF and the  
Government Development Bank of Puerto Rico.

10 ROBERT S. BRADY, ESQ., Young, Conaway, Stargatt &  
11 Taylor, LLP, for Popular, Inc., Popular Securities,  
LLC, and Banco Popular of Puerto Rico.

12 NICHOLAS P. CROWELL, ESQ., Sidley Austin, LLP, for  
Santander Puerto Rico, Santander Asset Management and  
13 Santander Securities.

14 KYLE J. KIMPLER, ESQ. Paul, Weiss, Rifkind,  
Wharton & Garrison, LLP, for the Ad Hoc GIO Group.

15 MARTIN L. SEIDEL, ESQ., Willkie, Farr & Gallagher,  
16 LLP, 787 Seventh Avenue, New York, NY 10019-6099, for  
the COFINA Agent.

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1 22 AUGUST 2017 -- 1:04 P.M.

2 THE CLERK: The United States District Court for  
3 the District of Puerto Rico is now in session on  
4 August 22nd, the year 2017, in the matter of In Re:  
5 The Financial Oversight and Management Board of  
6 Puerto Rico, as representative of the Commonwealth of  
7 Puerto Rico, et al, Bankruptcy No. 17-3283-LTS.

8 THE COURT: Good afternoon, everybody. And as I  
9 stated this morning, welcome to the latest seating of  
10 the Puerto Rico District Court in Massachusetts, and  
11 welcome to our friends in Puerto Rico.

12 All right. So, we're here on a motion of the  
13 Unsecured Creditors' Committee for Bankruptcy Rule 2004  
14 examination. Who's arguing?

15 MR. DESPINS: I am, Your Honor. Good afternoon,  
16 Your Honor. Luc Despins with Paul Hastings, Counsel  
17 for the Creditors' Committee.

18 Your Honor, we're here on our motion, 2004  
19 motion, for documentary production from three entities,  
20 Banco Popular, Santander and GDB. And this is a very  
21 important motion, Your Honor, very important not  
22 because it has been on the front page of all  
23 Puerto Rico papers for the last few days but because  
24 the people of Puerto Rico actually understand what's  
25 going on. When they hear two of the targets, GDB and

1       Santander, saying that it's okay to have an  
2       investigation, but the Oversight Board should do it,  
3       not the Creditors' Committee, these people may not be  
4       lawyers or judges, but they get it, they understand  
5       exactly what's going on.

6               So, let's start with the law, Your Honor. And  
7       this is, obviously, discovery, but it's much more than  
8       that, Your Honor. And, Your Honor, in a sense is going  
9       to have to put aside all these years of learning the  
10      Federal Rules of discovery because, as you know, 2004  
11      examinations have been described as a fishing  
12      expedition, so it's much broader than in the Federal  
13      Rules.

14             But here, basically you're in the position as if  
15      you were a Bankruptcy Court, and the way a Bankruptcy  
16      Court would approach this is to say, Okay, is there a  
17      good cause for the investigation, number one? On that,  
18      I don't think it's even close because people are not  
19      arguing that there shouldn't be an investigation;  
20      they're fighting over who should do it. And they are  
21      arguing that you should favor the Oversight Board's  
22      recently announced decision to start an investigation  
23      over the very concrete investigation that the Committee  
24      is seeking.

25             I would say, though, on the issue of cause,

1 before I move on, is that, you know, we attached a  
2 chart to our reply, which shows all the  
3 inter-relationships during the crucial years between  
4 Santander, GDB and Banco Popular and also members of  
5 the Oversight Board. They were not on the Oversight  
6 Board then, but clearly at that time they were wearing  
7 a different hat. And I want to be clear. This is just  
8 the tip of the iceberg. We could not fit all the other  
9 names on the chart. It's already very busy. But we  
10 could not list all of the other names, but there are  
11 many other names of people that were involved in what  
12 we refer to as the revolving doors.

13 But going back to the issue of, Can the Board's  
14 own announced investigation, not commenced but  
15 announced investigation, be a basis to deny 2004 relief  
16 to the Committee? I would say, and Your Honor knows  
17 this, that Mr. Bienenstock is a scholar. In his  
18 objection, he said Your Honor should direct the  
19 Committee to stand down in favor of the examination  
20 that the Oversight Board will do, as is the case with  
21 all other cases where this issue has come up, where an  
22 examiner is appointed. He cited no case for that  
23 proposition, and we are aware of none.

24 And, in fact, this issue has come up time and  
25 time again, and I want to be very clear before I go

1       into these cases that the issue here is not that an  
2       examiner has been appointed. There's no examiner  
3       that's been appointed. The examiner is somebody -- or  
4       it's not technically, but the person they seek to hire  
5       will not be identified for a good while now because  
6       their requests for proposals are not due until  
7       tomorrow. And, therefore, they're asking you to deny  
8       the 2004 motion in favor of an investigation that has  
9       not even been commenced, so that already is  
10      unprecedented.

11             But -- and this is an investigation where the  
12      Board would be telling you, Look, we've been appointed  
13      a year ago, we have the right to commence an  
14      investigation from the minute we were appointed, and we  
15      decided not to do it, but now we're really serious, we  
16      will do it, we want to do it, so please tell the  
17      Committee to stand down. And that type of argument has  
18      been made many, many times before. Cases -- and it's  
19      amusing because these are cases often that  
20      Mr. Bienenstock and myself were in a similar position.

21             The first one is *Enron*, a very well-known case  
22      involving Judge Gonzalez who's on the Oversight Board,  
23      and there was a -- the argument was made forcibly by  
24      the US Trustee, Please, Judge Gonzalez, shut down the  
25      Committee process, the 2004 process, because there's an

1 examiner that's going to be looking into all of these  
2 issues, and the Judge basically said, in so many words,  
3 that's the nature of the beast. The examiner has a  
4 different goal than the Committee. The examiner is  
5 there to write a report, same thing has here, their  
6 role is to write a report. The Committee has a  
7 different function, which is to do some basic blocking  
8 and tackling in the case. And in that context, the  
9 Court basically rejected the argument that the  
10 Committee should stand down, and the Committee  
11 continued, because I remember that vividly, with its  
12 full-blown investigation while the examiner was doing  
13 its own investigation.

14 Same thing in *Lehman*. I represented the  
15 Committee for the first six, eight months of the case.  
16 There was an examiner appointed. He wrote a report,  
17 just to give you an example, on the Barclays  
18 transaction. Well, the Barclays transaction was  
19 investigated by the Committee, and the reason I know  
20 this is because I was a witness myself at a deposition  
21 on the Barclays transaction, and the Counsel for the  
22 examiner was there, so clearly there were dual  
23 investigations. So, that's *Lehman*.

24 But there are many others that are cited in our  
25 papers, and I think it's very important, Your Honor, to



1 go through some of the reasoning that Courts have used.  
2 And just to give you a sense, Your Honor, there's a  
3 more recent case, which is the *Caesars* case, where  
4 Mr. Bienenstock represented one of the committees, and  
5 an examiner was appointed, and he filed a motion for a  
6 2004 examination, and it was objected to by the Debtor,  
7 saying, Don't -- this is wasteful. Don't let him  
8 continue his investigation because we have an examiner.

9 And I think it's important just to cite from  
10 Mr. Bienenstock's response, which is -- you know,  
11 this is a public case, you know, Case 15-01145,  
12 Document 655, Paragraph 21, where he stated, "One of  
13 the central functions of the UCC is to investigate the  
14 acts, conducts, assets and liabilities," et cetera.  
15 "Neither the Bankruptcy Code nor the bankruptcy rules  
16 qualify this authority in any respect. As a result,  
17 the possibility that a different party, e.g., an  
18 examiner may be investigating the Debtor's conducts or  
19 assets does not prohibit the UCC from conducting its  
20 own investigation." And as a matter of fact, the Judge  
21 entered an order granting the 2004 examination.

22 And it's very important. That order is  
23 Document 675 in that same docket, Case 15-01145. In  
24 that order, the Judge stated -- this is Paragraph 8 --  
25 "The examiner, the debtors, the creditors' committee

1 and the municipalities committee must use their best  
2 efforts to coordinate their investigation and avoid  
3 interference or needless duplication."

4 So, he doesn't say in that order that the  
5 examiner will control and the others have to stand  
6 down; it puts a burden on all the parties to work  
7 together to minimize duplication, which is fine, by the  
8 way. I think Your Honor could do the same here. That  
9 doesn't stop the basic principle, which is that we can  
10 be authorized to conduct our 2004 examination.

11 Another case that's key where, Your Honor, I  
12 represented the Committee was *Refco*. Same issue  
13 there, the Committee wanted to do an investigation,  
14 Judge Drain was faced with arguments by the US Trustee  
15 that it would be wasteful, et cetera, et cetera, and  
16 the Court entered an order. This is at, you know, Case  
17 No. 05-6006-RDD, Document 1487. There the Court  
18 said -- this is Paragraph 6 -- that the examiner and  
19 the creditors' committee shall cooperate and coordinate  
20 their efforts to assure, very important here, to the  
21 extent possible, that their investigations are not  
22 unduly duplicative, meaning it's recognized that  
23 there's going to be some duplication, but he said that  
24 it shouldn't be unduly duplicative, and of course how  
25 can we not agree with that general principle?

1 THE COURT: So -- I'm sorry. I don't mean to  
2 interrupt. But I recognize that it has happened in a  
3 lot of cases, and none of those settings are exactly  
4 the same as this case, and I have reviewed the cases,  
5 and I will let everybody argue their positions.

6 But I do have a big concern here on how to --  
7 assuming I would allow an examination, in this case, we  
8 also run into a lot of discovery in adversary  
9 proceedings, and the topic, as you've defined it, is so  
10 broad that I don't even -- I don't know how to get my  
11 head around it.

12 MR. DESPINS: Well, I think the best way is to  
13 look at -- there are various categories of document  
14 production requests. I want to be clear, this is only  
15 document production at this stage. We would not  
16 proceed with more than that without coming back to  
17 Your Honor for approval.

18 And basically there are a bunch of topics. One  
19 of them is the Constitutional debt limits. Puerto Rico  
20 has a Constitution that says, among other things, that  
21 you cannot exceed a certain amount of debt, it's based  
22 on a percentage, a complicated formula, but basically  
23 you're not -- you know, you're not supposed to exceed  
24 that amount of debt. Otherwise, you could just issue  
25 debt for a hundred percent of your income, and that

1 would not be a good thing.

2 So, there's a 15 percent, 1-5, cap, and the way  
3 it works is quite complex, but that's one of the  
4 issues, which is very present in this case, which is,  
5 Are some of the bonds, the billions of dollars of bonds  
6 that were issued, were they issued in violation of that  
7 cap? So, we're asking the targets, GDB, Santander,  
8 Banco Popular, for their documents regarding that  
9 issue.

10 And, you know, there'll be e-mails that say,  
11 Hey, we can't issue this, this exceeds the cap. Well,  
12 let me tell you what we're going to do, we're going to  
13 create a new structure, which is not going to be in the  
14 Commonwealth, we'll call it COFINA, and that will allow  
15 us to bypass -- I'm making this up, Your Honor. I'm  
16 not saying there is such an e-mail. I'm giving that as  
17 an example.

18 THE COURT: Thank you.

19 MR. DESPINS: So, obviously, that is very  
20 targeted, very relevant. And the 15 percent cap is an  
21 example. There are many other provisions that are at  
22 stake here. So, you know, clearly there are two things  
23 there. It could affect the validity of that debt. Of  
24 course that's very important. If there are billions of  
25 dollars of debt that are not valid, that's -- people

1 need to know that. That's one thing.

2 And, second, if in fact people were involved in  
3 doing this and were getting paid billions -- this is  
4 not an exagger -- billions of dollars in fees to  
5 structure these transactions, their potential claims, I  
6 emphasize the word "potential" because we don't know,  
7 we don't know the facts -- or we don't know all the  
8 facts, but there are potential claims against these  
9 people, and obviously, that's also critical, and that's  
10 the subject of this investigation.

11 So, that's just one of the examples that  
12 Your Honor -- and I think that those are -- how shall I  
13 say this? If there are a lot of documents responsive  
14 to that, then I think that the targets have problems,  
15 if you know what I mean. So, I think that it may sound  
16 broad -- and, by the way, I want to be clear, we're not  
17 here to argue scope and --

18 THE COURT: Well, I have to say I know that  
19 you're not, but I think that, under the good-cause  
20 standard, I think there have to be some parameters, and  
21 there have been very serious challenges to, Where do  
22 some of the statements made in your briefs go? You  
23 know, are they more -- will they actually lead, or  
24 potentially lead, to anything that benefits the estate,  
25 or are they more political statements? And I want to

1 make sure that we're dealing here in a fashion that  
2 will move the whole process forward and not get bogged  
3 down in a discovery dispute.

4 So -- and I think part of that has to do with --  
5 you started off by saying, Is there good cause? You  
6 know, you need to establish good cause, and it has to  
7 be good cause for what; right?

8 MR. DESPINS: Yes.

9 THE COURT: So, I think that maybe in this case  
10 we need a little more specificity up front than in some  
11 other more finite investigations, maybe phases, maybe  
12 progressive discovery. I don't know. And those are  
13 the kinds of things I would like to explore in addition  
14 to recognizing that there's an argument that there  
15 shouldn't be any examination at all. So, I guess what  
16 I'm telegraphing here is that I want discussion on  
17 both, you know.

18 MR. DESPINS: Okay. So -- and I will do that,  
19 Your Honor, I'll endeavor to do that.

20 So, putting aside for a second the issue of  
21 whether we should stand down for the Oversight Board,  
22 I'll come back to that, obviously, but I think the  
23 issue of cause is easy because the Board issued a press  
24 release saying, We need to investigate this, and their  
25 press release is as broad or broader than what we're

1 seeking. So, it's very hard to say on the one hand  
2 that they recognize that this needs to be investigated,  
3 it's fundamental. And by the way, the targets say the  
4 opposite, they just say, Don't let him investigate us,  
5 have the Board investigate us. So, I think --

6 THE COURT: Well, you've stated, you've argued  
7 that your investigation is broader than any  
8 investigation that the Board would do.

9 MR. DESPINS: No, that's not correct. What we  
10 argued is that statutorily we are granted broader  
11 powers to investigate than what they have.

12 So, let me take you through you that. They have  
13 a section, they're relying on 104.0, and 104.0 of  
14 PROMESA says that they may -- it doesn't say shall --  
15 may investigate the disclosure and selling practices in  
16 connection with the purchase of bonds issued by the  
17 covered territory for or on behalf of any retail  
18 investors; okay? So, we're talking about disclosure  
19 and selling practice to retail investors. That is very  
20 narrow in terms of a grant. That's the argument we've  
21 made. And if you compare that to what we're entitled  
22 to look at, which is the act, conduct, assets and any  
23 matters relevant to the formulation of a plan, that is  
24 as broad as you can get. That was our argument.

25 I think they want to occupy the entire

1 territory, meaning of what we want to do, but what I'm  
2 pointing out, and if we didn't do that well, I  
3 apologize, but what we tried to point out in our reply  
4 is that statutorily their grant is narrow, retail  
5 selling practices and disclosures, compared to our  
6 mandate, which is almost unlimited because it talks  
7 about the conduct, assets and any matters relevant to  
8 the formulation of a plan.

9 So, for example, the two examples that I give  
10 you, Is the issue of whether some debt is valid or not  
11 relevant to the formulation of a plan? Absolutely. Is  
12 the issue of whether debt is valid or not covered by  
13 retail selling practices? I'm not so sure it is. So,  
14 that's very important, to go and to compare the two  
15 statutes. What we said is that we have a much broader  
16 mandate.

17 But, Your Honor, I think that the only way -- I  
18 did say that I didn't think today would be the day to  
19 go into too broad -- you know, how many people are we  
20 going to search, but I hear you, and I think that, if  
21 we go through our document requests, other than the  
22 fact that, from the time point of view, they sound  
23 huge, and it's because the first time COFINA was  
24 created was in 2006, so I apologize for that. That's  
25 the way the facts are, and yes, so from 2006 through



1       2014 is a long time, we understand that; and,  
2       therefore, you may look at that and say, My god, this  
3       is too broad, but that's -- you know, we're stuck with  
4       those facts. If they had finished in 2014, they would  
5       be much narrower. If Your Honor has concerns about  
6       that, I hear that.

7               But there's one thing you said that actually  
8       troubled me a little bit. You mentioned political, and  
9       if one thing I'm not, it's political, and people know  
10      that and to my great disadvantage, and the Committee is  
11      not a political animal at all in the sense that they  
12      are looking at this, and it's not driven by any  
13      political agenda; it's just the fact that these issues  
14      do exist.

15             And by the way, in Detroit, the same issue about  
16      the validity of some Detroit debt was raised, was  
17      raised by the Debtor itself. Detroit itself challenged  
18      the validity of debt it had issued. So, I just want to  
19      make sure you know, so we're not completely crazy, this  
20      was done in Detroit as well.

21             THE COURT: And I don't want to be  
22      misinterpreted. I want to just make sure that what  
23      we're doing here stays in the confines of what's  
24      appropriate under the PROMESA statute.

25             MR. DESPINS: Absolutely.

1 THE COURT: That's where I want to be. And I  
2 recognize -- you started off by saying this is on the  
3 front page of the paper. I recognize that, but we're  
4 here to deal with it within the confines of the law --

5 MR. DESPINS: Yes, Your Honor.

6 THE COURT: -- and statute.

7 MR. DESPINS: But what I said is that it's very  
8 important not because it's on the front page of the  
9 newspapers.

10 THE COURT: I recognize that it is important.

11 MR. DESPINS: But it is on the front page. We  
12 can't ignore that dimension.

13 So, my point on the issue of, Should we be told  
14 to stand down, there are tons of cases, I won't bore  
15 you with them, but there are tons of cases that say,  
16 No, you don't have to stand down. And I have not heard  
17 one to the contrary.

18 But let's assume for a second that  
19 Mr. Bienenstock comes up with a case, a recent Supreme  
20 Court decision from last week that says that. These  
21 are cases involving an examiner who is appointed by the  
22 US Trustee and the Court, and it was answerable to no  
23 one other than the Court. This is not what we have  
24 here. What -- meaning -- I joke, I said it's kind of a  
25 god-like creature because that person writes a report

1 and is not answerable to anyone. In this case, that's  
2 not what they're proposing. They're proposing to hire  
3 someone, a regular person, who will do an investigation  
4 and report to this Board. And, therefore, this  
5 argument that we need to stand down is certainly not as  
6 compelling as those cases.

7 And even if they said what he -- but they don't.  
8 These precedents show that the Courts did look into  
9 this, and I mention Judge Drain, but I think it's  
10 really, Your Honor, two sentences. Basically the Judge  
11 said, "And, consequently, I can't ignore the fact that  
12 we should not hamstring the Committee's separate and  
13 independent obligation to investigate." And this is in  
14 response to US Trustee's attempts to shut down the  
15 Committee in the *Refco* case.

16 So, now, let's -- so we've been through the  
17 cases, and I think that we've been through 104 as well.  
18 But let's now go through through the issue of, Okay,  
19 the Board wants to do this -- by the way, I want to be  
20 clear, we're not trying to stop this. I hope this came  
21 through clearly. They can do whatever they want. We  
22 have no power to stop them. They have the power to do  
23 whatever investigation they want to do.

24 And I would say -- it's very important to say  
25 this: The Board members deserve kudos for the free

1 work they're doing. They're volunteers, and we don't  
2 take lightly criticism that we make of them in certain  
3 cases because these people deserve a lot of credit for  
4 spending all of their time on a volunteer basis to try  
5 to fix this situation. I want to make sure that's  
6 clear and that there's no allegation of lack of  
7 integrity, for example, on the part of Judge Gonzalez.  
8 That's not the issue at all.

9 But we have to step back and look at the facts,  
10 which is that they, in this instance, did not  
11 distinguish themselves. And what I mean by that is --  
12 let's look at the first thing. They have the power to  
13 investigate this from day one. Of course I'm not  
14 saying they should have started on day one, but a year?  
15 That's a long period of time.

16 And even if you're tempted to -- you might say,  
17 Well, they've been very busy, and that's a very good  
18 point. But they're not going to get less busy; they're  
19 going to get busier going forward, so that argument  
20 about being busy doesn't cut it. And if that were the  
21 only point, I would sit down, Your Honor, but it's not  
22 the only point.

23 They approved, in May, 2017, what I call the  
24 form of subpoenas, procedures to investigate, so -- and  
25 you might think, Wow, that shows you they want to go

1 forward. But that was in May. And, Your Honor, one  
2 has to think about what happened at that meeting,  
3 meaning they approved the form, presumably it's because  
4 they wanted to do an investigation, but what happened  
5 since then, until we filed our motion? Nothing. And  
6 also presumably at that point, somebody said or should  
7 have said, Hey, pointing to counsel, local counsel or  
8 counsel for the Board, can you guys help us with this  
9 investigation? And presumably the answer, if that  
10 question was asked, was, No, we can't, one counsel  
11 wrote the opinions on these deals and represents  
12 Santander, another counsel represents Santander on  
13 other matters.

14 So, do I know that these discussions take place?  
15 I don't know, Your Honor. My point is, if they didn't,  
16 that's really troubling because that was in May, and if  
17 somebody said, No, we can't do it, then they should  
18 have said, Let's hire somebody else right now. But we  
19 know now that, after we filed our motion, that's the  
20 first thing that they did, to go and retain somebody  
21 else. So, that's the first point.

22 And the second point is that, in June,  
23 Your Honor, you know, before we existed, meaning the  
24 Committee did not exist, the motion did not exist,  
25 Mr. Carrion came out of an Oversight Board meeting and

1 is quoted -- he doesn't dispute that -- as saying,  
2 "It's a waste of time to do this investigation." He is  
3 the Chairman of that Board. And you might say, Well,  
4 it's just a declaration. Who cares? But the point is  
5 that, again, two things happen: Either other people  
6 disagreed with him on the Board and said, No, we really  
7 care about this, in this case, I don't know why that  
8 wasn't expressed at all; or they did agree with him and  
9 waited until we filed our motion to say, You know what,  
10 we need to do something here because the Committee will  
11 control the territory, and we don't want that to  
12 happen. And that's exactly what happened here.

13 And the last thing they did, Your Honor, is they  
14 said, after we filed the motion, they said, Okay, now  
15 we're going to do it, and they formed this Committee,  
16 and the Committee is comprised of Mr. Carrion. And,  
17 again, two days after I meet with them and tell them,  
18 How could you put Mr. Carrion on this Committee, given  
19 that his father was on the Board of Banco Popular, that  
20 his family founded the Bank, et cetera? Mr. Carrion  
21 resigns. Okay.

22 So, you might think, Well, now they're okay.  
23 But, Judge, the point is the Committee looks at this  
24 and says, It's not because they have un-pure hearts,  
25 that's not the point; the point is that they are really

1 busy with other things, and they're really not  
2 motivated to do the investigation. They're doing it  
3 because we pushed them into it, which is not our role.  
4 We're not interested in playing that role.

5 And that's why the Committee should not be told  
6 to stand down, because we have no idea what could  
7 happen, meaning they'll -- and here I want to draw on  
8 your experience, Judge. Let's assume today nobody's  
9 been retained -- right? -- there are no professionals  
10 retained for this investigation. That's number one.  
11 So, they need to retain those people. That's going to  
12 take some time. I'm not going to try to guess, but  
13 it's going to take some time.

14 They're going to have to do conflict checks,  
15 waivers and all that. Good luck, by the way, finding a  
16 law firm in Puerto Rico that doesn't have a conflict  
17 with Banco Popular and Santander, but putting that  
18 aside, let's assume they do that. Once they have that  
19 team, it's going to take that team some time to get up  
20 to speed, and then they're going to have to serve  
21 subpoenas. And Banco Popular and Santander are not  
22 going to say, Oh, sure, come and get whatever documents  
23 you want; they're going to be back right here, and  
24 there's going to be some back-and-forth.

25 The point I want to draw, Your Honor, that's why

1 I want to draw on your experience on this, does anyone  
2 believe they will get any documents out of Banco  
3 Popular and Santander before January 1st, 2018? I  
4 don't buy that for a second because they're so far  
5 behind. And so you might say, So, who cares? Well,  
6 the Committee cares because we don't care about the  
7 report, meaning if they want to issue that report in  
8 2020 that nobody will write, that's their prerogative.

9 But there are things happening in the case. You  
10 heard this morning about this mediation. We can't talk  
11 too much about it, but as you know, that it's going  
12 full bore, and the purpose of that mediation is not to  
13 resolve the case in 2020; it's to resolve it  
14 tomorrow -- I'm exaggerating -- you know, soon.

15 THE COURT: Tomorrow would be good.

16 MR. DESPINS: Well, tomorrow would be good.

17 THE COURT: What timeframe are you thinking of?

18 MR. DESPINS: Well, we already have the document  
19 requests, meaning if Your Honor authorized us to do the  
20 2004, we could have the meet-and-confer with Banco  
21 Popular and Santander in the next two weeks, and I hope  
22 we would agree on something, but if we don't, we can go  
23 back -- we can be here by the first week of September,  
24 and at that point they've had the document production  
25 requests for a good two months, so it's not like they



1 can say they need two months to produce that.

2 THE COURT: Well, we can assume that they're  
3 going to tell me that they haven't done their document  
4 search yet. So, if you were going to start today, how  
5 long would you contemplate?

6 MR. DESPINS: I think we can easily have  
7 documents from them by the beginning of October, not  
8 all the documents but some documents. And that's  
9 crucial, Your Honor, because -- I'll give you an  
10 example. This is Docket No. -- in this case, it's  
11 Docket No. 1056. It's a 2019 statement, which  
12 reflects that Santander has 2.5 billion in Commonwealth  
13 bonds, \$2.5 billion. This is not a random number.  
14 \$2.5 billion. So, these bonds may be all good. I  
15 don't know. My point is that, clearly, this  
16 investigation is relevant to that at the very least, so  
17 I don't know how we're going to, you know, not get  
18 documents until January and actually try to resolve the  
19 case without addressing these issues head on. And how  
20 do we really deal with the case without knowing what  
21 debt is valid?

22 THE COURT: And that's my other question. When  
23 you raised the issue of the Constitutional debt limits,  
24 is that being raised in any of the other adversary  
25 proceedings?

1 MR. DESPINS: That's a tough question because  
2 there are 25 adversary proceedings.

3 THE COURT: Yes. That's why I'm asking you.

4 MR. DESPINS: I'm at a pause for --

5 THE COURT: Because I think, in this case, it's  
6 not only coordination with any other investigation that  
7 might be going on outside of the parameters of the  
8 Title IIIs, but it's also coordination with what's  
9 going on in connection with the numerous cases that  
10 are --

11 MR. DESPINS: That's a very good question, but  
12 I -- it's always dangerous to answer a question like  
13 this on the fly, but there are a bunch of  
14 Constitutional issues that are being raised, for  
15 example, by the GIO bonds in a lawsuit, that they want  
16 to be deemed -- that was just transferred, Your Honor,  
17 yesterday or the day before -- they want to be deemed  
18 to be secured or have priority based on the  
19 Constitution.

20 But that doesn't raise the issue of whether some  
21 of their bonds are not valid because of the 15 percent  
22 cap. To my knowledge, I don't think that the issue of  
23 Constitutional -- of violating the Constitution -- or  
24 validity of a certain debt instrument I don't believe  
25 has been hit head on to date, but people will correct

1 me if I'm wrong on that.

2 So, from a timing point of view, there is just  
3 no way that this -- that we cannot deal with this  
4 immediately, Your Honor. Let me just -- sorry.  
5 Flipping through my notes here for a second.

6 THE COURT: In addition to the Constitutional  
7 limits, if you were going to characterize your  
8 requests, what other topics would you -- how would you  
9 divide it into different topics?

10 MR. DESPINS: Well, there is the issue of the  
11 validity of the COFINA structure. That's number two.  
12 And that has many implications, Constitutional and  
13 non-Constitutional, meaning, Why was COFINA created?  
14 We know that, at that time, the Commonwealth was  
15 hitting a wall, basically could not borrow any more in  
16 2005 and 2006, and somebody came up with the idea of  
17 creating COFINA. How was that created? Why was it  
18 created?

19 THE COURT: And that's in the context -- that's  
20 also going to be the Unsecured Creditors' Committee's  
21 investigation in the Commonwealth-COFINA dispute;  
22 right?

23 MR. DESPINS: Yes, and I'll -- yes, but it's  
24 two -- it's hitting one bird with -- yeah -- two birds  
25 with one stone -- sorry -- because there is that

1 investigation, which is, if in fact we can challenge  
2 the COFINA structure, we will. And so that's one  
3 issue.

4 But the second issue is, if people were involved  
5 in creating a structure that was designed to avoid some  
6 law or Constitution in Puerto Rico, there should be --  
7 or there could be claims asserted against these  
8 entities that then turned around -- I'm not saying this  
9 happened, but it could have happened -- turned around  
10 and just sell those bonds to other parties.

11 So, the same e-mail can have two purposes: One,  
12 to be used in the adversary -- in the litigation  
13 between Commonwealth and COFINA; and, two, to be used  
14 to determine the validity of some of the claims of  
15 these entities or whether there are claims against  
16 those entities with respect to fees that were paid by  
17 GDB or the like.

18 So, it's two separate issues. And that's one of  
19 the points we're making, which is the Oversight Board  
20 took itself out, you know that, of the  
21 COFINA-Commonwealth dispute, so they're out of that.  
22 So, they -- because they're the agent for the  
23 Commonwealth and Bettina-White is the agent for the  
24 COFINA side, and the work we're going to do to review  
25 that structure will be -- as I said, will have double

1 duty, meaning to look at whether there was some bad  
2 conduct by people knowing that these transactions  
3 should not have been done but also to determine whether  
4 transactions are valid or not, so that -- and the  
5 Oversight Board would only have single duty on that  
6 type of discovery, and that's why we think we should be  
7 allowed to go forward.

8 Then, I would say, Your Honor, even if the Court  
9 were inclined to deny the 2004, which I think would be  
10 very troubling to us, but if you're inclined to deny  
11 it, we would still be entitled to get from Santander,  
12 Banco Popular and GDB all the documents relevant to the  
13 COFINA transaction because that litigation is -- not  
14 the litigation, but that issue is teed up, it's a live  
15 issue, and there's no argument that the Oversight Board  
16 will say, No, we'll write a report on that. The  
17 Oversight Board is not going to write a report on the  
18 validity of the COFINA structure. They can't. They  
19 took themselves out of that by --

20 THE COURT: But then I run into the principle  
21 that, if the same discovery is being sought in an  
22 adversary proceeding, it seems to be a pretty bright  
23 line about having the discovery at least be governed by  
24 the Rules of Civil Procedure for that category.

25 MR. DESPINS: Your Honor is correct to the

1 extent that the target of the discovery is the  
2 Defendant in that other proceeding. So, I'll give you  
3 an example. If we were suing Santander tomorrow, let's  
4 assume, you know, for some reason the Oversight Board  
5 says, Okay, we'll give you the right to do that, we're  
6 suing them tomorrow, we cannot seek 2004 discovery of  
7 Santander in that context. That's hornbook law.  
8 That's what you just stated.

9 However, that's not what's happening here. In  
10 the context of the Commonwealth-COFINA dispute,  
11 Santander and Banco Popular and GDB are not Defendants.  
12 The Defendant is an entity called the COFINA because  
13 the litigation will be over the issue of who owns that  
14 money that's either COFINA or that could be deposited  
15 in COFINA in the future.

16 So that -- the cases -- and we cite a decision  
17 by Judge Walrath in -- I forgot the name of the case.  
18 It involved insider trading. It'll come back to me.  
19 But we cite this case for that very proposition, which  
20 is the Defendant has all the rights to say, Wait a  
21 minute, I'm a Defendant in a litigation, you cannot  
22 issue 2004s to me. But Banco Popular and Santander and  
23 GDB will never be Defendants in the COFINA-Commonwealth  
24 litigation. That litigation will have two parties, the  
25 Commonwealth and COFINA. The others are just

1 third-party targets, and they --

2 THE COURT: But you would seek discovery from  
3 them in the Commonwealth-COFINA --

4 MR. DESPINS: Correct. And, by the way, just so  
5 you -- the party that could complain about this would  
6 be the lawyer sitting right here who's the lawyer for  
7 the COFINA agent, but they're happy to have us get the  
8 documents because we've put in the proposed order that  
9 they will get whatever we get from Santander, Banco  
10 Popular and GDB on the COFINA dispute. They're going  
11 to get that directly, so there's not going to be any  
12 games here at all. Therefore, the only party that  
13 could have an argument about this is not arguing this  
14 because we put that in the order, that whatever we get  
15 on the COFINA-Commonwealth dispute, we have to give to  
16 them immediately.

17 THE COURT: And is there any significance to the  
18 fact that the Board's investigation would have to be  
19 made public and yours does not?

20 MR. DESPINS: No. Actually, I'm glad you raised  
21 that because it shows why other Courts have allowed  
22 both to go forward at the same time, because, I mean,  
23 objectively you might look at that and say, Wait a  
24 minute. Two investigations going on at the same time,  
25 that sounds a bit too much. But the reason why Courts

1 do that is because there are different goals here.

2 Their goal, they're mandated by Congress to make  
3 their report public. We have no such duty. Our job is  
4 to maximize recovery for unsecured creditors, and  
5 therefore -- let me give you some concrete examples.  
6 In *Enron*, for example, we conducted 2004 discovery of a  
7 bunch of targets and got billions of dollars in claims  
8 reduction or affirmative recovery against them. At the  
9 same time, the examiner was writing his report, but two  
10 different, completely different roles, and that's why,  
11 you know, I think Judge Gonzalez said it's the nature  
12 of the beast in a sense that that's why Courts allow  
13 the two to go forward.

14 And even for -- assuming for a second that we  
15 find nothing, I'm not saying that's the case, but let's  
16 assume that we do the investigation and there is no  
17 problem, everybody is squeaky clean, and all these  
18 billions were properly paid and all that. The  
19 investigation still needs to be done because we need to  
20 know whether there's a challenge to their claims  
21 because, as you can see, there are billions of dollars  
22 of claims asserted by some of these entities; and also  
23 in terms of -- that's the other point I make is that  
24 2004 is not only to assert claims, this is very  
25 important; it's also to the extent it involves or



1 affects the administration of the case, and what do I  
2 mean by that? We said that in our reply.

3 The Commonwealth does not have cash; it has some  
4 cash, but it doesn't have \$75 billion of cash; right?  
5 Otherwise, we wouldn't be here. What it has is future  
6 income, and it can give that to creditors in the form  
7 of bonds. The future bondholders, the creditors we  
8 represent who are going to take bonds or indebtedness  
9 from the Commonwealth deserve to know, they need to  
10 know whether there were any, for lack of a better term,  
11 shenanigans going on or whether the same people are  
12 still involved in that context.

13 THE COURT: Then, how do they get that  
14 investigation information if your investigation isn't  
15 public?

16 MR. DESPINS: It's not that we're precluded from  
17 making it public because I'll give you an example. If  
18 we found -- I want to be clear here, there's no basis  
19 to say this, but if we found that people who were  
20 involved in the construction of the structures that  
21 were illegal or that they knew were illegal are still  
22 involved, I guarantee you that we would file something  
23 with the Court to say that. It's not because we don't  
24 have an obligation to be public that we would not make  
25 it public, but I know that creditors want to know who

1 they're dealing with, what the issues were, and the  
2 problem is that the Board may not get to write its  
3 report for several months.

4 And by the way, I want to be clear, I can't  
5 blame them. They're charged with saving the Island --  
6 I'm exaggerating slightly -- but to revitalize the  
7 economy, to come up with a plan of adjustment. They  
8 have a lot of things on their plate, and that's where I  
9 started, and that's where I'll end, Your Honor, subject  
10 to a short reply in the end, which is that they are not  
11 motivated or they don't have the tools now to do this,  
12 and -- to do this investigation, so if they want to do  
13 it and they do it on their own schedule, that's fine;  
14 but there are too many things going on now for them to  
15 handle this and an investigation that's, frankly,  
16 overdue at this point.

17 Thank you.

18 THE COURT: Thank you.

19 MR. FRIEDMAN: Your Honor, good afternoon.  
20 Peter Friedman on behalf of FOF and the Government  
21 Development Bank of Puerto Rico.

22 I cannot emphasize enough that neither the  
23 Committee nor Mr. Despina speak for the people of  
24 Puerto Rico, which is how Mr. Despina started. The  
25 people of Puerto Rico are spoken for by their

1 Government and the Oversight Board, which was appointed  
2 pursuant to PROMESA. The Committee is not an ombudsman  
3 or a roving party to spray pledge into every portion of  
4 the Government's conduct. That's not its job, it's not  
5 its responsibility.

6 Now, one thing you did not hear anything about  
7 was cost, the cost in the cases Mr. Despina mentioned,  
8 *Enron*, *Washington Mutual*, *Refco*, *Lehman Brothers*,  
9 et cetera, *Caesars*, it's hundreds of millions of  
10 dollars to conduct investigations, and that money  
11 goes into lawyers' pockets, including a FOF's lawyers  
12 pockets. Where won't it go? It won't into two places.  
13 It won't go into creditors' hands, and it won't go into  
14 the people of Puerto Rico's expenditures going forward.  
15 And that's just not acceptable, for that money to be  
16 spent on a duplicative investigation because of course  
17 that's what it'll be. Now, also --

18 THE COURT: Isn't that -- I mean, the Board's  
19 investigation hasn't started yet, though; right? So,  
20 isn't the -- I'm concerned about the costs. Let me  
21 make that very clear. I am concerned about the costs,  
22 and I am concerned about making sure that people have  
23 the time to devote themselves to the issues that need  
24 to be resolved here.

25 On the other hand, I'm very aware of the need or

1 the ability of the Committee to conduct investigations  
2 to see if there are appropriate other avenues to  
3 pursue. It's a balancing act.

4 But when you tell me cost, I don't have anything  
5 going forward right now, so it seems to me it's a lot  
6 in your control as to sort of where that cost gets  
7 incurred.

8 MR. FRIEDMAN: From FOF's perspective and the  
9 Government's perspective, it's not at all in our  
10 control; right? We have the Oversight Board conducting  
11 a statutorily designed investigation under 104 of  
12 PROMESA. I'm not sure it even needs 104 of PROMESA. I  
13 think, as a debtor's representative, it also has the  
14 right to pursue any claims that belong to the debtors  
15 well before the Committee ever gets the opportunity to  
16 pursue those claims. So, from FOF's perspective, one  
17 investigation we recognize the need for, and that's --  
18 that ought to be in the hands of those to whom Congress  
19 specifically gave that responsibility.

20 And I note, Your Honor, that this is not a  
21 typical Chapter 11 case, and the purposes of this case  
22 are different; right? This case, unlike a Chapter 11  
23 where you have, you know, necessarily marshaling of  
24 assets, that's not what this is about; and the cases  
25 we've cited in our papers make really clear what a

1 Title IX -- or Chapter 9 or a Title III case is  
2 supposed to be about, which is about maintaining the  
3 balance of public services between creditors and a body  
4 politician and a governmental entity. Those appear in  
5 our papers. And that's what this is about.

6 So, you know, it's not about the kind of  
7 investigation that you might typically have, and in  
8 fact none of the cases cited involve a public entity.  
9 I will note that, for example, though, Chief Judge  
10 Morris of the Southern District of New York Bankruptcy  
11 Court did, in *Dinegy*, let only one investigation go  
12 forward when an examiner had been appointed and refused  
13 let the creditors' committee tag along or conduct its  
14 own investigation because she was so concerned about  
15 cost issues.

16 And so, in fact I think that, for at least  
17 purposes of this, both in terms of PROMESA 104 and the  
18 Oversight Board's general powers, I think it's probably  
19 most appropriately analogized to a trustee. And when  
20 you look at the *Buick* case, which we cite in our  
21 papers, what did the Court say? It said, "Rule 2004  
22 investigations shouldn't be used to interfere with the  
23 powers of a trustee." And that's precisely what would  
24 be done here.

25 Now, we don't have -- and, by the way, the

1 fishing-expedition cases that were cited, *Young*, *Suk*  
2 and others, something was missing, and what's missing  
3 is the extensive discussion in those cases, which the  
4 Court hit on, which is that good cause is a balancing  
5 test, and you measure the intrusiveness and the expense  
6 against the benefit. And Mr. Despins, you know, I  
7 think tried to characterize as best he could the  
8 document requests that the Committee has served as  
9 narrow, but it's just not true.

10 Request 14 to GDB requests all communications  
11 between GDB and Banco Popular and Santander since  
12 2006, all documents concerning the claw-backs,  
13 documents about the credit worthiness of the  
14 Commonwealth, documents about -- you know, concerning  
15 COFINA and the COFINA structure. That's not narrow,  
16 that's not circumscribed; that's massive. That's  
17 designed to impose massive burdens and run up massive  
18 fees. And so it's just not right to say that there's  
19 any effort at a narrow -- at this being narrow. And,  
20 by the way, when you look at requests like all  
21 documents concerning COFINA, I do think you run head on  
22 into the parallel proceeding doctrine that the Court  
23 discussed.

24 Now, if the point is that the COFINA agent has  
25 already agreed that it will not seek different

1 documents or isn't going to try to whipsaw us with  
2 specific requests in that matter, then, you know, we  
3 can discuss, as the FOF and GDB, we can discuss those  
4 requests in the context of a proceeding that has not  
5 yet been started but we know will be soon starting.  
6 We're happy to sit down with Counsel for the agents --  
7 for the Commonwealth and the agents.

8 THE COURT: Do you want to speak right now?

9 MR. SEIDEL: I will await him. Martin Seidel  
10 from Willkie Farr & Gallagher. We appeared, filed our  
11 notices just yesterday, but we're Counsel to the COFINA  
12 agent. And I've now been spoken for twice by people  
13 I'm not sure I'm prepared to have speak for me.

14 THE COURT: So, have a seat.

15 MR. FRIEDMAN: That's my point. I can't speak  
16 for Mr. Seidel. What I can say is, though, that a  
17 single set of requests -- we can't be whipsawed, and  
18 that's what a unilateral commencement of Rule 2004  
19 process on COFINA-related issues outside of the context  
20 of actual litigation would do to us, which -- in any  
21 event, litigation which we know to be coming.

22 Your Honor, I think that, in some ways, the  
23 most -- or the best analogy to this is probably the  
24 *MF Global* where the -- and it's not perfect; right? In  
25 some ways it's apples and oranges, but apples and

1 oranges both drop to the ground and both grow on trees  
2 and both have juice if you squeeze them, so there are  
3 some similarities.

4 And that's why there's a single trustee who's  
5 given specific powers to do things and to look into  
6 things and to report and to bring appropriate causes of  
7 action, and there's no doubt that, if the Board chose  
8 to, it could exercise that power here. And the Court  
9 said, Look, Judge Glen said, Look, there's a structure,  
10 there's a statute in place that gives certain people  
11 powers, and that's the horse we're going to ride for  
12 discovery, and we're not going to allow 2004 discovery.  
13 It's not a perfect analogy because that wasn't a -- I  
14 don't believe that was a creditors' committee seeking  
15 discovery, and I recognize there's things somewhat  
16 different about a creditors' committee, but I think the  
17 larger point is the important one, that the powers that  
18 the Oversight Board has are important.

19 And, again, it is not correct to say, as was  
20 alleged in the papers, that FOF or GDB support the  
21 Oversight Board to do an investigation because we think  
22 the Oversight Board will be lenient. We don't. We  
23 expect them to be unsparing in whatever conclusions  
24 they reach. We just do not want to have to pay for it  
25 twice. I think that's the issue.



1           And, you know, is there some method or mechanism  
2       proposed by the Oversight Board in its motion that  
3       would permit the Committee to have some ability to look  
4       at documents and submit questions or read transcripts  
5       that might keep costs down while still letting the  
6       Committee have some sense of what's going on? You  
7       know, I don't think we can object to that. You know, I  
8       think the Oversight Board made a proposal, and you  
9       know, while I would prefer -- I know my clients would  
10      strongly prefer to have no double-billing, we  
11      understand that, that may be somewhat of an appropriate  
12      compromise.

13           But two unfettered investigations is just -- you  
14      know, has real repercussions when you look at the  
15      dollar figures that have come up and -- as you know,  
16      Your Honor already heard this morning, our clients are  
17      constantly subject to mediation, as I think you know  
18      because you got a list of them the other day, there's,  
19      I mean, literally 19 adversary proceedings plus one  
20      filed this morning. I assume that may be referred to  
21      you soon. People have also jobs to do and, you know,  
22      so balancing --

23           THE COURT: But I solved all your problems this  
24      morning.

25           MR. FRIEDMAN: Thank you, Your Honor.

1 Hopefully, some of them will be solved again this  
2 afternoon. And so -- but, you know, it's a real issue  
3 as to how we do that. And I do think many of the  
4 issues in discrete ways that are listed in this  
5 document request may come up in different adversary  
6 proceedings or in plan-confirmation proceedings, and if  
7 they do, so be it. But the fishing-expedition nature  
8 of this is not justified under the good-cause standard.

9 THE COURT: Can you tell me the scheduling of  
10 the Oversight Board investigation?

11 MR. FRIEDMAN: I can't, Your Honor. I think  
12 Mr. Bienenstock can speak to that. And obviously, you  
13 know, we'll work on that, and, you know, we'll address  
14 with them how to move forward in an appropriate manner  
15 on -- you know, on a schedule that I think balances  
16 everybody's needs and particularly the most important  
17 need, which is wrapping this case up in a plan  
18 that maybe not everybody loves but provides appropriate  
19 recoveries without, you know, the need for people  
20 writing magnum opuses while the case is pending.

21 So, that's all I have. I don't know if you have  
22 any questions for me, Your Honor, but I'd happy to  
23 concede the lectern to Mr. Bienenstock, if he'd like to  
24 speak.

25 THE COURT: Thank you.

1 MR. BIENENSTOCK: Good afternoon, Judge Dein.  
2 Martin Bienenstock of Proskauer Rose for the Oversight  
3 Board, as representative of the Commonwealth and the  
4 other Title III Debtors.

5 Your Honor, I'm going to try to restrict my  
6 remarks to a comment Your Honor made early on, that  
7 Your Honor knows there are some special facts that are  
8 attributable to this matter, as opposed to the matters  
9 that the Committee referred to in other cases. And I  
10 think the facts here and the statute here speak volumes  
11 and also make the Court's decision much simpler than it  
12 might appear.

13 So, I'd like to start by mentioning some of  
14 the facts and laws that go to the big picture. In  
15 Chapter 11, as Your Honor no doubt knows, there are  
16 some trustees in some cases, and where there are not  
17 trustees, there are examiners in other cases. When  
18 there's a trustee, the trustee is allowed to both  
19 operate the business and conduct conduct investigation.  
20 When a trustee is not appointed and an examiner is  
21 appointed instead, the examiner conducts the  
22 investigation but does not run the business.

23 I say that to start because the Committee made  
24 the point that, in this case, there's no examiner.  
25 Well, that's not right. Under Section 301(c)(7) of

1 PROMESA, the Debtor is deemed to be the Trustee, and  
2 the Oversight Board is the representative of the  
3 Debtor, as the Trustee. It says, everywhere the  
4 statute says "Debtor," it should be read -- or  
5 everywhere the statute says "Trustee," it's the  
6 Oversight Board. We are the investigator and the  
7 examiner.

8 And the issue that the Committee put to  
9 Your Honor, whether it should be told to stand down, is  
10 not the issue; the issue is whether it should be  
11 allowed to stand up, and I don't say that because it's  
12 a catchy phrase, which I'm not very good at normally --

13 THE COURT: It's not a bad one, though.

14 MR. BIENENSTOCK: -- but there's a significant  
15 difference here. The difference is this: The reason  
16 the Committee is front of Your Honor this afternoon  
17 asking for relief and the Oversight Board and  
18 Commonwealth are not is that the Commonwealth and  
19 Oversight Board are already authorized by PROMESA, in a  
20 few provisions I'll mention in a moment, to conduct  
21 investigations. The Committee is not. The Committee  
22 needs this Court's permission to be the second horse on  
23 one track. And the way I would put the issue to  
24 Your Honor is whether Your Honor really wants to put  
25 two horses on the same track. It can get a little

1 crowded.

2 THE COURT: Well, what in PROMESA eliminates the  
3 2004 examination by the Committee? I mean, that's the  
4 problem. You know, it's incorporated some provisions  
5 and not others. It doesn't eliminate this examination.  
6 I mean, it doesn't say, You don't have this authority.  
7 I have these bankruptcy rules that exist and are  
8 enforceable in the context of PROMESA.

9 MR. BIENENSTOCK: Right. So, let me just start  
10 by giving you the Oversight Board's authority, and then  
11 I'll get to the Committee's contingent authority.

12 THE COURT: Okay.

13 MR. BIENENSTOCK: The Oversight Board's  
14 authority is not what the Committee represented to  
15 Your Honor a few moments ago, which is that we have the  
16 narrow scope of investigation set forth in the PROMESA  
17 Section 104.0 relating to selling practices of the  
18 various banks of the Commonwealth's debt. That is one  
19 investigation that Congress singled out.

20 But to look at the Oversight Board's authority,  
21 Your Honor would have to start with Section 104(a) of  
22 PROMESA, which says, "The Oversight Board may hold  
23 hearings, sit and act at times and places, take  
24 testimony and receive evidence, as the Oversight Board  
25 considers appropriate." One cannot have a broader

1 charge to investigate anything that seems appropriate  
2 than that. And the 104.0 that the Committee points to  
3 is simply one sub-set of the items that the Oversight  
4 Board may investigate.

5 It is truly extraordinary, Your Honor, as  
6 compared to the Bankruptcy Code, for PROMESA to  
7 constitute the Oversight Board as an investigatory  
8 body. It literally says to the seven members, You may  
9 sit and hold hearings, you may issue subpoenas, you may  
10 take testimony, you may get documents, you may enforce  
11 your subpoenas. That's -- Congress could not have sent  
12 a stronger message that it meant for the Oversight  
13 Board to investigate.

14 Now, to answer Your Honor's question, What about  
15 the Committee, the bankruptcy -- or PROMESA, as  
16 Your Honor knows, incorporates the bankruptcy rules,  
17 which include 2004, and the key to Rule 2004 is very  
18 simple. It's not self-operative; Your Honor has to  
19 authorize it and to make the -- that's why I said the  
20 issue is whether they get to stand up today. And to  
21 determine whether Your Honor should do that today, one  
22 has to take into account the facts and circumstances of  
23 the case and what Congress intended to happen.

24 There can be no argument that Congress did not  
25 intend for the Board to conduct this investigation.

1 For gosh sakes, it empowered it to do it with powers  
2 that no other board in bankruptcy has ever had before,  
3 to our knowledge. So --

4 THE COURT: But it doesn't require it, does it?

5 MR. BIENENSTOCK: No, it's not required. The  
6 Board is given a lot of discretion, but the Board in  
7 this case has gone public and has basically said it has  
8 exercised its discretion to do it.

9 And just as in the COFINA-Commonwealth dispute,  
10 while the Board could have simply imposed a proposed  
11 settlement and brought it to the Court and said, Please  
12 find that it's in the zone of reasonableness, which is  
13 the bankruptcy standard for approval of settlements,  
14 the Board decided that, for the good of the process,  
15 transparency, et cetera, there would be a Commonwealth  
16 agent who we made the Committee and a COFINA agent who  
17 the COFINA creditors decided on and the Board approved.

18 The Board, nevertheless, reserved in that  
19 protocol the right, at any time, to do its own  
20 settlement and to propose plans of adjustment. But the  
21 Board believed that, for the good of the process, and I  
22 believe Judge Swain, at the first hearing, encouraged  
23 this, encouraged us to defer to other agents selected  
24 by creditors so that people would have confidence that  
25 the COFINA-Commonwealth dispute was not being biased in

1 any way because Congress made the Board the  
2 representative of COFINA but also made it the  
3 representative of the Commonwealth, so we were on both  
4 sides.

5 The investigations we're talking about here have  
6 none of that. These are investigations to determine  
7 causes of action that the estate may have against third  
8 parties -- the Board is not on both sides -- or that  
9 creditors may have against third parties that they can  
10 independently sue on.

11 Importantly, Your Honor, under bankruptcy law  
12 and Supreme Court decisions, the Committee is not  
13 allowed to sue in the name of creditors, and in this  
14 case, one of the unique facts that I think Your Honor  
15 was alluding to, consciously or unconsciously, earlier  
16 is Section 305, which says that no one can interfere,  
17 including the Court, with a Government's property  
18 without the consent of the Oversight Board.

19 So, while, in Chapter 11 cases, committees  
20 similar to the ones -- similar to the one here for the  
21 general creditors, they often get, under a plan,  
22 permission to have derivative standing to sue on the  
23 estate's cause of action against third parties, and  
24 they do that in the context of some type of litigation  
25 trust that goes on after the plan is confirmed.



1           That's not happening here for a very simple  
2       reason. To the extent causes of action of the  
3       Commonwealth are identified or of the other debtors,  
4       the Commonwealth's instrumentalities, the Commonwealth  
5       is not going to cede to a committee the right to  
6       interfere and prosecute those. The Commonwealth will  
7       take care of it by itself. And certainly the Committee  
8       cannot be so presumptuous as to assume that the  
9       Committee will get any type of derivative standing.

10           The Committee does point in its reply to PROMESA  
11       Section 926 where derivative standing can be given, but  
12       those are just to avoidance actions, those preferences,  
13       fraudulent transfers and the like, which are not the  
14       types of actions that people are talking about here, at  
15       least for the most part.

16           Now, in my now 40 years of practice, I've heard  
17       Judges consistently, without exception, say they don't  
18       like to be told about orders in other cases because you  
19       have to know what the facts were in the other cases to  
20       make sense of the order. That is probably illustrated  
21       ideally here, unfortunately. For instance, the  
22       Committee says, Look at the order in *Enron* where the  
23       Committee and an examiner and *Enron* itself could all  
24       conduct investigations simultaneously. The Committee  
25       didn't give Your Honor a really important fact about

1       *Enron*. The order appointing the examiner that allowed  
2       for these three investigations was a settlement of a  
3       creditors' request for the appointment of a Chapter 11  
4       trustee.

5               Judge Gonzalez, who was the bankruptcy Judge in  
6       *Enron*, did not decide that he wanted three  
7       contemporaneous investigations; he was presented with a  
8       settlement agreement that, as Your Honor knows, Judges  
9       can't write the settlements, the parties have to either  
10      settle or not, and they decide on the terms. So, it  
11      was not a judicial decision to allow for  
12      contemporaneous investigations; it was the product of a  
13      settlement agreement, which was embodied in the order  
14      appointing the examiner.

15             And then they point to *Caesars Entertainment*.  
16      In *Caesars Entertainment*, the Committee, the General  
17      Creditors' Committee, was granted permission to conduct  
18      Rule 2004 examinations before an examiner was ever  
19      appointed. And the Committee points Your Honor to the  
20      order appointing the examiner, which, upon reading,  
21      it's a fair reading of that order, that there were  
22      going to be contemporaneous investigations.

23             But, there again, the Committee didn't give  
24      Your Honor the most important fact. After Judge Gerber  
25      entered that order, he basically looked at Committee

1 Counsel, which I was one, and he basically said, You'd  
2 better sit down with the examiner and agree as to how  
3 this is going to unfold, or I will consider things like  
4 injunctions. And what did we do? What we did was the  
5 examiner went forward with both document production and  
6 depositions and informal interviews and committed to  
7 provide the -- there were two committees -- the  
8 documents that it was allowed to provide. Some were  
9 marked with various confidentiality waivers and other  
10 things. We didn't get them all, but we got what the  
11 examiner was allowed to give us.

12 So, there were not contemporaneous  
13 investigations; there was the examiner's investigation,  
14 and the Committees got the benefit of the examiner's  
15 document discovery and depositions, deposition  
16 transcripts, and some were redacted.

17 As the Retirees' Committee knows, and frankly,  
18 as Mr. Despina knows also, we have told both Committees  
19 that, as we do this investigation, we do want to both  
20 consult with them and share discovery. We have not  
21 made hard-and-fast commitments because we believe that  
22 the investigator, which will likely be a law firm, that  
23 the Oversight Board retains should be at the table when  
24 we make the final arrangements.

25 But overall, we want them both to be consulted

1 during the process, and that includes -- they can feed  
2 questions to be asked to different witnesses, they can  
3 get the discovery -- the documents we're allowed to  
4 give them, and they can make suggestions as to  
5 additional documents or witnesses that should be  
6 deposited or interviewed.

7 THE COURT: What's your schedule on this, on the  
8 appointment of the investigator?

9 MR. BIENENSTOCK: We are hopeful that the Board  
10 will retain an investigator next week, and the  
11 investigator would get to work immediately, and  
12 there's -- it was very easy for the Creditors'  
13 Committee earlier to talk about production starting in  
14 October without the targets being present to object,  
15 but there's no reason why whatever the timetable the  
16 Committee would have would be any faster than the  
17 timetable we have. And in fact, the Oversight Board  
18 basically has more at its disposal under PROMESA to get  
19 documents and to compel testimony than they do. So, we  
20 would be no slower; we might be a little faster.

21 THE COURT: And what's your impression as to the  
22 scope of the examination that the Board would do, as  
23 opposed to the Creditors' Committee?

24 MR. BIENENSTOCK: Well, currently, what the  
25 Committee have asked for is largely incorporated by

1 104.0 of PROMESA, and the Board is definitely covering  
2 that. But the Board is going to be interested in  
3 basically two subjects: One is anything that might  
4 bring material assets to the creditors and the people;  
5 and the other is anything necessary to create sunshine  
6 about the causes of the losses, taking into account  
7 some important factors, Your Honor. Most of the  
8 \$74 billion of debt that we're restructuring was issued  
9 more and, in most cases, a lot more than three and six  
10 years ago, so there are serious statute of limitations  
11 issues, except for the transactions in the last six  
12 years, and it might be less than that.

13 Also, it's not as if the people of Puerto Rico  
14 and most of the world don't know that the primary cause  
15 of this situation is prior governments that simply  
16 issued debt to fund deficits rather than make  
17 structural changes to eliminate the deficits. And  
18 while there might have been improper selling methods or  
19 not, that's yet to be investigated, in the context of  
20 74 billion of bond debt and 50 billion of unfunded  
21 pension debt, whether the cause of action we're talking  
22 about can be materially -- will materially impact  
23 recoveries is something we're going to find out, but  
24 the numbers are so huge, if you compare it to the net  
25 worth of Santander and Banco Popular, if you grabbed

1 everything they had in sight, if they have liability,  
2 it's not as if it's going to pay creditors in full.

3 So, I think it has to be done -- the  
4 investigation has to be done objectively, understanding  
5 the upsides and the downsides and that the expense  
6 could easily out-do the upsides if it's not done  
7 carefully, which the Oversight Board intends to do.

8 The Committee made something of the fact that  
9 the Board was appointed on August 31, 2016, and it's  
10 now doing the investigation. I don't know that, that  
11 needs defense, Your Honor, but some facts ought to be  
12 on the record in that connection.

13 The Board has certified fiscal plans for the  
14 entire Commonwealth as well as several of its main  
15 instrumentalities. The Board did not have an Executive  
16 Director and even a General Counsel until well into  
17 2017. The Board hired its first Deputy General Counsel  
18 only in the last two months. The Board now has a staff  
19 to help the Oversight Board members who,  
20 notwithstanding that they were uncompensated, were  
21 working frequently as close to 24/7 as one can work,  
22 and that included -- and this is something I have  
23 personal knowledge of -- over every Thanksgiving,  
24 Christmas and New Year's holiday one can think of.

25 This investigation, partly for the reasons I was

1 just mentioning, that one has to keep perspective in  
2 mind as to how much of a difference it might make, was  
3 not more important than getting fiscal plans done and  
4 on the road to the restructure, and the Committee  
5 acknowledged that. In May, the Board announced how it  
6 was going to go forward with the investigation. It's  
7 not as if it was at all in reaction to any Rule 2004  
8 motion of the Committee.

9 As far as publishing the investigation, there  
10 are always two reasons for an investigation in  
11 bankruptcy, Your Honor: One is to see if you can find  
12 something that will help enlarge the pie for the  
13 benefit of the stakeholders; the other is simply to  
14 provide sunshine. Creditors are suffering losses.  
15 They should know why. And the Board both has a  
16 statutory obligation in connection with 104.0 to  
17 publish the findings of that investigation, but the  
18 Board also doesn't have a problem making public other  
19 findings because the sunshine policy is important, and  
20 the Board is in a perfect position to provide that  
21 sunshine. Also, you know, we keep a public website,  
22 and contracts and letters to the Governor, sometimes  
23 back and forth, are often put on that website. The  
24 Board has certainly been as transparent as possible;  
25 whereas, the Committee acknowledged that's not its job.

1 But to the extent that we want to maximize the benefit  
2 of the investigation, both the benefit of enlarging the  
3 pie and to satisfy what I'll call the sunshine policy,  
4 the Board is obviously in a much better position to do  
5 that.

6 So, bottom line, what we're asking for is for  
7 the Board to be able to progress on its investigation.  
8 We want to provide both Committees the consultation  
9 rights, the access to discovery that I described  
10 earlier, also to get recommendations from them, and if  
11 they think, for instance, we haven't asked for some  
12 documents that would be useful, they can tell us what  
13 they are and we can ask for them. We will also end the  
14 investigation, and if they think that there are things  
15 we left uninvestigated that should be investigated,  
16 they can come to this Court at any time before or after  
17 we finish to see whether those things should be  
18 separately investigated by them.

19 But we're not aware, at least I'm not aware, of  
20 anything, of any case where there was not a strong  
21 coordination emanating from the Court to prevent  
22 simultaneous requests for documents or testimony from  
23 the same witnesses at the same time. It just doesn't  
24 happen. And usually it's done by what I've described  
25 earlier, that if the examiner or the equivalent of the



1 examiner or trustee is going forward, the others do  
2 not. Whether they get authority and they're ordered to  
3 stand down or they don't get authority, that becomes a  
4 distinction without a difference. The fact is they  
5 can't do it while an examiner or a trustee is doing it  
6 because it makes no sense.

7 And Your Honor can imagine, and it has more  
8 experience than any of us here, the witnesses sought,  
9 Your Honor can imagine what they're going to say when  
10 they say, Oh, I got a subpoena from this committee and  
11 from that committee and from the Oversight Board.  
12 Which should I deal with first? Should I see if  
13 there's overlap? Should I -- how should I -- who gets  
14 my first time? How many hours do I have to spend in  
15 deposition? Your Honor could probably add to my list  
16 of horrors, but you don't even have to be a lawyer to  
17 know that this is not a situation that anyone would  
18 knowingly and intentionally create, and that's what the  
19 Committee is asking Your Honor to do.

20 And now that Your Honor knows what really  
21 happened in *Enron* and what really happened in *Caesars*,  
22 it's not like any Court intentionally ever let two  
23 investigators loose on the same witnesses at the same  
24 time. It just doesn't happen.

25 And what we've recommended is a common-sense

1 approach that, frankly, the Retirees' Committee  
2 virtually came up with by itself, perhaps  
3 simultaneously with us because we had done it in other  
4 situations, they've seen it as well in other  
5 situations, and it didn't satisfy the General  
6 Creditors' Committee, and I regret that, but it should  
7 satisfy them for now. Your Honor's not doing anything  
8 permanent today; we just ask that, at this time, they  
9 not be authorized to go forward with a contemporaneous  
10 investigation.

11 THE COURT: Thank you.

12 MR. LEVIN: Good afternoon, Your Honor.  
13 Richard Levin of Jenner & Block for the Retiree  
14 Committee.

15 I want to first thank Mr. Bienenstock for that  
16 kind of shout-out there at the end. We did come up  
17 with that proposal, and we support it. We think the  
18 investigation should take place in the first place by  
19 the Oversight Board, and if that is inadequate, as  
20 Mr. Bienenstock says, in the minds of the Retiree  
21 Creditors' Committee or the General Creditors'  
22 Committee, we would be back here seeking further  
23 authority.

24 I'd like to start with just a couple of quick  
25 answers to some questions that Your Honor had raised or

1 that were remarked on, and I have just a few points to  
2 make. There's been reference several times to the  
3 *Enron* investigation. In that case, there were two  
4 examiners because there were two -- there was the  
5 parent company, and there was Enron North America,  
6 which was a somewhat separate company.

7 The examiner of the parent company, 15 years  
8 ago, cost \$100 million. That's public record, and I  
9 don't think anybody in this Courtroom would dispute  
10 that. So, when we're talking about cost, we ought to  
11 have a kind of a sense of order of magnitude that we're  
12 talking about here. Other examinations have cost  
13 substantial amounts, and as Your Honor is aware,  
14 lawyers' rates have gone up at times, and these things  
15 have gone up. It's hard to imagine that the cost of an  
16 examination would go down.

17 Second, Your Honor asked about whether the  
18 Constitutional debt issue was being raised in any  
19 litigation. I believe that's one of the central issues  
20 or one of the many central issues, if that's not an  
21 oxymoron --

22 THE COURT: We'll let it go. Go ahead.

23 MR. LEVIN: Yeah. It's one of the central  
24 issues in the COFINA litigation because, as Mr. Despina  
25 said, the question of whether the COFINAs were legally

1 issued has a lot to do with whether they were a  
2 work-around for the Constitutional debt limitation.

3 Third, there's been a -- well, let me go to the  
4 few points I want to make, Your Honor. Your Honor also  
5 asked what eliminates Rule 2004 in PROMESA. Nothing  
6 does. But 2004, as everyone here in the Courtroom  
7 acknowledges, is discretionary; it's not mandatory,  
8 it's not -- if a party in interest requests an  
9 examination, the Court must grant authority.

10 It is in the Court's discretion, and so the  
11 question is in this case: Is it wise now, given the  
12 Board's oversight and investigatory powers, to  
13 authorize a second investigation? And the Retiree  
14 Committee believes that, by coat-tailing on the  
15 Oversight Board's investigation, we think that's the  
16 most efficient way to proceed and the wisest way to  
17 proceed, rather than authorizing two or perhaps three,  
18 because if the Court were to authorize the unsecured --  
19 General Unsecured Creditors' Committee investigation,  
20 there's nothing to distinguish the Retiree Creditors'  
21 Committee. We have the same status, the same standing,  
22 the same duties, the same powers, and we actually have  
23 a larger constituency in terms of dollars and in  
24 numbers of creditors.

25 And the Retiree Committee Counsel is very

1 experienced and well-respected for its investigative  
2 abilities, having been the Counsel to the examiner in  
3 *Lehman*; having conducted the General Motors ignition  
4 switch investigation, which was lauded by the Second  
5 Circuit; having been the monitor for Credit Suisse  
6 under the New York State Banking Commissioner and many  
7 other confidential investigations as well.

8 But our point is: As experienced as we are at  
9 this, we don't think we should be competing on a  
10 first-come, first-served basis, who gets here first, to  
11 do an investigation. It makes sense, as  
12 Mr. Bienenstock said, for Congress to have authorized  
13 the Oversight Board to lead this process.

14 THE COURT: So, let me ask you this because you  
15 always -- everybody always walks in here with new  
16 information. No matter how much I read, you have more  
17 information for me. What's your understanding of the  
18 timeline of the Board's investigation, the scope and  
19 your involvement in defining any of that? If you've  
20 reached an agreement or, at least in principle, you've  
21 talked about how you're going to work with the  
22 Oversight Board's investigation, what's your  
23 understanding of the timeline of that investigation,  
24 the scope of that investigation and your Committee's  
25 role in it? Just give me an overview.

1           MR. LEVIN: We don't have a sense of the timing  
2 yet. I think we have to wait for the Board -- I hope  
3 next week and -- the Board has been pretty quick in  
4 selecting professionals in other contexts. They put an  
5 RFP out, the proposals come in a week or ten days, and  
6 the Board, within the next week, typically selects.  
7 And so they're due tomorrow. I would expect they would  
8 select sometime next week, and then we can get started  
9 on that. So, beyond that, I don't have a sense of the  
10 timing.

11           As far as the scope goes, I think you heard  
12 Mr. Bienenstock's statement about that, and we support  
13 that. But I want to go a little bit broader than what  
14 Mr. Bienenstock said. I'm sure he would agree with me,  
15 having thought about it in the heat of the moment up  
16 here. It's not only a question of looking, in the  
17 Board's investigation, looking at potential causes of  
18 action against third parties, but one of the important  
19 things that the Board must do in its role as the  
20 Trustee in this case is object to claims. Mr. Despins  
21 said part of the investigation might be for the purpose  
22 of objecting to claims. That's the Board's  
23 responsibility.

24           I'm not saying that nobody else may object to  
25 claims. The statute does permit that in certain

1 circumstances, but I think Congressional intent here is  
2 clear that the Board's investigation has to include  
3 that as well.

4 And in connection with our cooperation with the  
5 Board's investigation, we would encourage that because,  
6 if the amount of the claims get reduced because for  
7 some reason they are objectionable or improper or  
8 shouldn't be allowed under Section 502 of the  
9 Bankruptcy Code, which is incorporated, then we  
10 would -- then other creditors will fair better because  
11 the limited pie would go a little bit further because  
12 there will be fewer mouths to feed. Sorry for the  
13 metaphor. So, we think the Board's investigative  
14 authority is broad. We would encourage it to use that  
15 for all of those purposes, and that's how we think the  
16 cooperation would work here with the Board's  
17 investigative authority.

18 Now, the General Committee has also  
19 authorized -- has offered to share results but has not  
20 been so forthcoming as the Board has in terms of  
21 consultation in advance of conducting the  
22 investigation, and that's another reason we favor the  
23 Board's leadership in this. And the General Committee  
24 has been offered that same participation in the  
25 Oversight Board's investigation, and since one is

1 offering and the other is offering, it's more a  
2 question of who should control, and I think it's pretty  
3 clear, as Mr. Bienenstock said, that Congress intended  
4 in PROMESA that the Board would lead this process, that  
5 Congress gave the Board tremendous powers throughout  
6 the case and especially on this one in the  
7 investigatory role.

8 I'd also ask the question, Whom the General  
9 Committee is trying to protect? Section 1103(c)(2) of  
10 the Bankruptcy Code on which the General Committee  
11 relies gives the Committee investigative authority,  
12 true. Mr. Despins cites that correctly.

13 But Section 1103(c)(5), the last in the powers  
14 given to the Committee, tells the Committee it has the  
15 power to "perform such other services as are in the  
16 interest of those represented." So, other services in  
17 the interest of those represented, such other -- seems  
18 to be a limiting concept on the powers listed in  
19 Paragraph 1 through 4. I should note Paragraph 4 is  
20 authority to request the appointment of a Trustee.  
21 Obviously, that doesn't apply in this case, at least a  
22 general Trustee. So, I think the applicability of  
23 Section 1103 in this context has to be read in the  
24 context of PROMESA, not in the context of an ordinary  
25 commercial Chapter 11 case.



1           And the Committee's authority is limited to  
2       service for those that it represents, and that is, as I  
3       said before, the general creditors, which, based on  
4       Judge Swain's order last week on the GIO bondholders'  
5       motion to expand the Committee, suggests that their  
6       representation doesn't even include the GIO  
7       bondholders. It certainly doesn't include the COFINA  
8       bondholders. The Board has a much broader mandate than  
9       the Creditors' Committee.

10           So, with those points, Your Honor, we favor  
11       Mr. Bienenstock's approach and the Board's leadership,  
12       and we urge the Court to deny the motion on that basis.

13           MR. BRADY: Good afternoon, Your Honor.  
14       Robert Brady of Young Conaway Stargatt & Taylor on  
15       behalf of Popular, Inc.; Popular Securities, LLC; and  
16       Banco Popular of Puerto Rico.

17           Your Honor, we filed two pleadings in connection  
18       with this motion: One, an objection and reservation of  
19       rights with respect to the Committee's Rule 2004  
20       motion; and we also join in certain aspects of the  
21       Oversight Board's objection. Your Honor, like many of  
22       the objectors, the Popular entities agree that the  
23       Oversight Board is the appropriate party to lead this  
24       investigation.

25           Congress provided that important investigatory

1 power would be invested in the Oversight Board, and  
2 Your Honor, we do not join in these objections because  
3 somehow we believe that the Oversight Board will be  
4 less thorough or take it easy on the financial  
5 institutions; we raise the objection because there  
6 should be one coordinated discovery process, not as  
7 many as three separate investigations.

8 That, Your Honor, is more cost-effective and  
9 efficient for the Commonwealth, and the Popular  
10 entities are corporate citizens of Puerto Rico, they  
11 are creditors of the Commonwealth, and, as such, they  
12 have an interest in reducing costs in this case. But a  
13 coordinated process, Your Honor, also is more efficient  
14 and cost-effective for the Popular entities. And  
15 both the rules of discovery and case law regarding  
16 Rule 2004 make it clear that that's a valid  
17 consideration for the Court to prevent burdensome and  
18 unnecessary discovery.

19 Despite the Committee's assertions, Your Honor,  
20 that multiple investigations on the same issues happen  
21 all the time, that is not the norm in cases under the  
22 Bankruptcy Code. This to us really seems more about  
23 control, who will control the investigation, and the  
24 UCC is attempting to control it by being the first to  
25 the Courthouse. However, Congress has already spoken.

1 The Oversight Board was given this authority and the  
2 power to conduct the investigation, and there's no  
3 doubt, and you've heard it today, that they'll do so in  
4 coordination with the Committees. As you've heard,  
5 Rule 2004 is discretionary, and we think the Court  
6 should exercise its discretion to prevent duplication  
7 of effort and expense.

8 The Popular entities recognize that an  
9 investigation will happen. Despite the inflammatory  
10 tone and the innuendo in the UCC's motion and reply,  
11 the Popular entities are confident that, after  
12 discovery, it will be clear that my clients did nothing  
13 wrong. But that process should be one coordinated  
14 process, and the Popular entities, as indicated, have  
15 reserved their rights to raise objections to whatever  
16 discovery is ultimately issued.

17 Now, if the Court is inclined to allow the  
18 Committee to commence a Rule 2004 exam, we think  
19 they've really put the cart before the horse here,  
20 Your Honor. They refused a meet-and-confer before  
21 filing the motion and opted for a process where they  
22 get authority and then meet and confer on the scope,  
23 but as Judge Bernstein found recently in the *Sunedison*  
24 case -- and this is 562 BR 243, it's a January, 2017,  
25 opinion -- "The concept of proportionality and concerns

1 regarding the burden on the producing party are  
2 relevant to the determination of cause under  
3 Rule 2004."

4 So, again, if Your Honor is inclined to let the  
5 Committee commence a 2004 exam, all rights need to be  
6 reserved, including that any particular request, that  
7 they have not established cause based on the  
8 proportionality test. So, again, Your Honor, we ask  
9 the Court to deny the motion, allow the Oversight Board  
10 to lead a coordinated effort in this regard, and if the  
11 Court is otherwise inclined to allow UCC to proceed,  
12 that all rights be reserved for the parties who are the  
13 target of the 2004.

14 THE COURT: Thank you.

15 MR. CROWELL: Good afternoon, Your Honor.  
16 Nick Crowell from Sidney Austin for Santander Puerto  
17 Rico, Santander Asset Management and Santander  
18 Securities.

19 I'm not going to take long here because I think  
20 most of the arguments I was going to make have already  
21 been made repeatedly. We would just support the  
22 investigation by the Board. We're not afraid of an  
23 investigation by the Committee, as they suggest. We  
24 think Mr. Bienenstock will be as painful as they would  
25 be, and we think that there should only be one

1 investigation, however.

2 The Committee wants to be a free-ranging sheriff  
3 here, looking for any wrongdoing, but really they're a  
4 sheriff without any weapons because they cannot bring  
5 any claims, they're not authorized to do so. So, what  
6 is the point of a feed-grab and a feed-grab that's  
7 going to result in a lot of costs to the estate? The  
8 Oversight Board has the authority. Let them proceed.  
9 They say they're going to proceed. We can always  
10 re-visit later, Your Honor, if they haven't done  
11 enough, if people don't think that they've done enough.

12 One other thing I would just point out that  
13 makes us a little bit different than Popular is that my  
14 client is also the subject of a class action from  
15 bondholders, some of the very creditors that the  
16 Committee purports to represent. And I'm not asking  
17 you to feel sorry for my client, but I do ask that you  
18 recognize that resources are limited, and if we are  
19 going to be subject to three or possibly four different  
20 investigations by the Retiree Committee, it will make  
21 their jobs that they actually have to do and get paid  
22 for impossible.

23 So, again, we would agree with what has already  
24 been said here today, which is: Let the Oversight  
25 Board do the investigation, let them coordinate it, let

1       there only be one investigation, though, Your Honor.

2             Thank you.

3             THE COURT: I don't have to give your client my  
4       lecture on securities litigation, which is you don't  
5       have to review the same documents that are privileged  
6       for each separate lawsuit? You just review them once.

7             MR. BRADY: Understood, Your Honor.

8             MR. SEIDEL: Good afternoon, Your Honor.  
9       Martin Seidel, Willkie Farr & Gallagher, for the COFINA  
10      Agent. I'll be very brief.

11            We take no position with regard to whether the  
12      2004 investigation should take place, but I want to be  
13      clear, since both Mr. Despins and the FOF Counsel used  
14      me as a prop, if you will, used my client as a prop, if  
15      an investigation takes place, to the FOF point, we're  
16      not coordinated with them. In fact, they're our  
17      adversary. They are the COFINA -- they are the GIO  
18      Agents in the COFINA-GIO dispute. So, we're not  
19      coordinated with them on their 2004 investigation. And  
20      while they may give us everything, I don't want that to  
21      prejudice our rights to discovery in the COFINA-GIO  
22      dispute.

23            Second, to Mr. Despins' point about giving us  
24      everything, given that the GDB, one of the targets  
25      here, is the parent entity of COFINA, we want to make

1       sure that there's no waiver of privilege in anything  
2       that's provided to Mr. Despins, should a 2004  
3       investigation go forward.

4               Thank you very much.

5               THE COURT:   Okay.   Do you want to respond?   Let  
6       me tell you -- let me give you some initial thoughts,  
7       and then I'll let you all talk some more.

8               I feel like the motion was filed at a time when  
9       the Board had really not made any efforts to go forward  
10      with this investigation.   No blame on that.   Reality.  
11      I feel like that it was also made at a time before the  
12      COFINA-Commonwealth stipulation was entered into as to  
13      how that would go forward.   And I think a lot has  
14      been -- a lot has changed.

15              I'm balancing two very real concerns.   The  
16      Board's investigation is not mandatory.   There are no  
17      time limits, there are no defined objectives, and there  
18      are no specific parameters that have to be met in the  
19      Board's investigation, and I -- until the Board  
20      actually has somebody who's doing this investigation,  
21      all I've heard about legitimately is that the Board are  
22      individuals who don't have time to do anything other  
23      than, you know, what they're doing.

24              So, I think bringing in the investigator changes  
25      the dynamics, but I still have the concerns that the

1 scope of the investigation is just -- I don't know  
2 where that will actually fit in, in reality, other than  
3 in goodwill. I don't know how that would fit into the  
4 investigation that the UCC actually wants to and should  
5 be able to conduct.

6 I have a lot of concerns about the financial --  
7 financial costs? No? Talk about a phrase that's  
8 awful. -- about the costs of this investigation and on  
9 the burden of those who are going to be involved in it.  
10 The need for cooperation is huge, but I don't want to  
11 stall things while the Board is kind of getting its  
12 investigation started.

13 So, I'm trying to figure out if there are topics  
14 that can go forward. Do I say to the UCC, You need to  
15 coordinate in the COFINA-Commonwealth litigation, come  
16 up with a plan on, How do you share that information  
17 and go forward with that? Because I gather that's  
18 going forward regardless of the investigation; right?

19 So, it seems to me that that's assignment one,  
20 is, How does the Commonwealth-COFINA discovery go  
21 forward, both in the context of the adversary  
22 proceeding as well as perhaps additional topics that  
23 would be covered by the UCC just as a Creditors'  
24 Committee?

25 I think the second task has to be at least an



1 effort by whoever is selected by the Board to see if  
2 agreement can be reached on a way to coordinate an  
3 investigation by the Board and the UCC and to determine  
4 whether or not there are topics that are just easily  
5 divisible or not, you know, dividing the  
6 responsibility, making sure there's no overlap. There  
7 may be topics that the UCC is concerned with that the  
8 investigator does not have a high priority for. I just  
9 don't know. And I feel like that opportunity -- we  
10 should take advantage of that opportunity.

11 Now, I do say that, but that's not in my notes  
12 because this is new, that somebody is being actually  
13 appointed. You know, I mean, this is all happening  
14 fast. And you may very well come back, and I  
15 understand some skepticism as to whether actually  
16 somebody will be appointed soon and whether it will  
17 happen soon, and so I think we need to set some dates  
18 for this real coordination, and if it doesn't happen, I  
19 guess my underlying order is that I don't see anything  
20 in PROMESA that makes the Oversight Board's  
21 investigation mandatorily exclusive. I think we all  
22 agree with that, and I think we all agree that the UCC  
23 2004 investigation is authorized by PROMESA, within my  
24 discretion; okay? So, I don't have, as a matter of  
25 law, that either or both of them can -- is ruled out.

1           But on the other hand, neither of them is  
2       mandatory, and I just don't have a sense of how real --  
3       given that they have different overarching concerns, I  
4       think there are different timelines that may be  
5       involved, I think there may be different priorities  
6       that are involved, and it may make sense to allow the  
7       UCC Committee -- the Committee to go forward in certain  
8       areas while the investigation of the Board goes forward  
9       in others. I just don't know.

10           So, I'm also -- I do have statute of limitation  
11       issues here, and I don't quite know where they fit in,  
12       which is sort of my big question mark on my paper  
13       going, Where does the statute of limitations fit in on  
14       this? But maybe that comes up more in a specific  
15       objection or not. But I think that the Committee needs  
16       to phase this proposed investigation even if you were  
17       given free rein. I think it's too big. It's too big,  
18       it's too amorphous; and, frankly, I can't tell where it  
19       interferes with other adversary proceedings and,  
20       frankly, the general proceedings of the whole PROMESA.

21           So, the problem with thinking out loud is you're  
22       all writing it down, and I'm thinking about it, but  
23       those are the -- I need to have a way of going forward  
24       that makes sure that as much coordination as possible  
25       happens, and I want to give the Board the opportunity

1 of engaging in that conversation with the UCC, but I  
2 want the COFINA-Commonwealth discovery to go forward.  
3 So, do I send you all -- because you all negotiate so  
4 much better outside the room here. Do I say to you, In  
5 the next couple of weeks, you submit a schedule to me,  
6 a proposal, in a week you do it? All right. That  
7 having been said, now you can object to everything that  
8 I've just said.

9 But I've not given you a lot of time to think  
10 about all of those.

11 MR. DESPINS: No. So, let me -- I just want to  
12 hit some points, and I will come back, I promise, on  
13 all of your points. But the first point is: No one  
14 has said that there's any case where a Court has  
15 directed a -- or denied a 2004 based on an examiner  
16 being appointed. People have said that's not the norm,  
17 and Mr. Bienenstock said, Yeah, but the Judge  
18 threatened us, but there's -- at the end of the day, he  
19 got his order that said, You're entitled to do your  
20 2004 examination. After that, people get together, and  
21 they negotiate a protocol. I'm all for that. Of  
22 course that should happen. But he and the others did  
23 get an order that said, Your 2004 is authorized, and  
24 the Judge did say, You will coordinate, as you just  
25 indicated. So, that's just -- that's not disputed.

1           So, let me -- one thing I did not do and I  
2       wanted to mention is that we focused on three entities,  
3       GDB, Santander and Banco Popular, but there are many  
4       other entities involved. If you just want to Google  
5       "UBS Puerto Rico," you'll find all sorts of SEC actions  
6       involving these entities.

7           And there, it's possible that the Board has no  
8       conflicts. I mean, I wouldn't -- you've read our  
9       papers, and you know why we are concerned about the  
10      Board being involved. It's not only because  
11      Mr. Carrion, for example, his family founded Banco  
12      Popular; it's also because there are two of the Board  
13      members that are in that chart about the revolving  
14      doors. And when Mr. Friedman talks about FOF believes  
15      this, FOF believes that, his clients are exactly --  
16      they're not on that chart because we would have -- the  
17      chart would be illegible, but his clients are in the  
18      same position. They are all former -- or not all; the  
19      senior people are all former Santander people, Judge;  
20      okay? So, let's understand that. It's either Banco  
21      Popular, Santander, all the same.

22           So, my point is: There are three entities that  
23      are in the revolving-door business, these three, GDB,  
24      Banco Popular, Santander. There are others that also  
25      sold bonds on the Island, and I don't want to single

1 UBS out, but there are many others. So, you talked  
2 about a potential outcome here. Let the Board, you  
3 know, hire a god next week. Mr. Bienenstock said he  
4 was hopeful. We have no idea who that person is. I'm  
5 sure he doesn't have any idea either.

6 And Mr. Levin, on behalf of the Retiree  
7 Committee, has signed off on that, but he has no idea  
8 what the timeline is either. Let them hire god, and  
9 god can jump in and follow on what has been done with  
10 the Banco Popular, Santander and GDB, and he can do  
11 that for all the other institutions. I am hereby  
12 telling you, we will not do any of the other -- we'll  
13 check to make sure they're thorough in what they are  
14 doing, but we will not take the lead on that because  
15 there is no conflict there, meaning the Board members  
16 have a conflict on these three entities, and that's why  
17 we started with that.

18 THE COURT: But that's the conversation that I  
19 want you to have with -- assuming that someone is  
20 selected in the near future, because I do recognize  
21 that it's not going to go on forever, but if somebody  
22 was appointed next week and given a week to read the  
23 papers, that is the kind of conversation that I would  
24 expect that you would have, that you would say, For  
25 these three entities, we really feel there's too big a

1 conflict for you to take the lead in this  
2 investigation, but for these ten entities, go for it.  
3 Maybe there would be agreement, maybe there wouldn't.  
4 I don't know.

5 MR. DESPINS: But you're assuming for a second  
6 that those discussions did not take place. All right.  
7 I'm not going to say more than that.

8 THE COURT: Well, I don't know.

9 MR. DESPINS: But the point is we have been at  
10 this for a while. You know, the issue of objecting to  
11 claims is key. Mr. Levin lectured us about the  
12 Bankruptcy Code, but 502 of the Bankruptcy Code says  
13 any party in interest can object to a claim. And there  
14 are billions of dollars in claims at stake. We need to  
15 get the investigation yesterday, Judge, we need to --

16 THE COURT: But you have the  
17 COFINA-Commonwealth, which is a huge part of this  
18 investigation, and there's no reason why that can't get  
19 started.

20 MR. DESPINS: That's discrete. It deals with  
21 the COFINA. And by the way, you're right, we will do  
22 that; but there's another part of this, which are the  
23 GIO bonds, the general obligation bonds, which is  
24 something like \$17 billion. And there are other bonds  
25 as well, but I mean that --

1 THE COURT: Right, and I don't under -- I don't  
2 know, as I'm sitting here, what the scope of the  
3 discovery is in that case or where that is or whether  
4 the Committee's going to come and tell me they need to  
5 do the discovery.

6 MR. DESPINS: Well, there's --

7 THE COURT: I mean, I take that back. Where's  
8 the issue? When I asked you whether the issues that  
9 you were raising were being held in -- were being  
10 raised in -- like, the debt limit, is that going to  
11 come up in the GIO proceeding?

12 MR. DESPINS: No. The GIO proceeding, they're  
13 saying, I'm secured -- I'm speaking as a BIO bondholder  
14 now -- I'm secured, I'm entitled to priority.

15 THE COURT: So that they're -- but is somebody  
16 going to challenge that?

17 MR. DESPINS: Well, no, because -- I'm sure  
18 somebody like the Board will say, No, you're not  
19 secured; or, no, you're not entitled to priority for  
20 the following reasons. I don't know that, but I assume  
21 that's going to take place.

22 But there's a totally different issue, which is,  
23 Have some of these bonds been issued in violation of  
24 the Constitution, debt limit and otherwise, and that  
25 applies to other bonds as well, that, that

1 investigation should have happened two months ago. And  
2 so that's why waiting for god or waiting for a new --  
3 somebody who they don't even know who that is, to be  
4 appointed or fully -- Mr. Bienenstock was very honest,  
5 he said hopefully. Hopefully, I don't know what that  
6 means.

7 And so I -- right now, I think the Court should  
8 direct us to those three entities, to these parties to  
9 meet and confer with us. By the way, they'll be in  
10 document production, they'll never have to produce it  
11 twice, meaning the same document. They say it's  
12 burdensome. They will not have to produce it twice.  
13 And we will coordinate with the COFINA Agent to make  
14 sure they're satisfied. If they're not happy with the  
15 document requests, we'll make sure that they don't have  
16 to do that again, so I can represent that to the Court.

17 But as to those three entities, while we're  
18 waiting for this god person to be appointed, we  
19 should -- the Court should direct the parties to meet  
20 and confer and to come back to Court with an agreed- or  
21 not-agreed-upon order on the production of documents  
22 only with respect to the issues we're seeking,  
23 Your Honor.

24 And we know that the document production  
25 requests are sometimes too broad, but that -- let's put



1       it this way: When is the last time you've ever seen a  
2       document request that was accepted by the target ever?  
3       So, there's no -- you know, so therefore, this argument  
4       that it's too broad, yes, I can make arguments that  
5       it's too broad as well, but the point is the parties  
6       should meet and confer. This has started probably more  
7       than a month ago at this point. We filed our motion on  
8       July 21st. They've had this. We can sit down with  
9       them and come back to Court, and if god is found and  
10      she or he can jump in and be involved and can convince  
11      the Court that he or she should be doing all of it, so  
12      be it. But in the meantime, we don't want to waste  
13      time, lose the momentum we have. I think that's very  
14      important, Your Honor.

15               THE COURT: Thank you.

16               MR. KIMPLER: Good afternoon, Your Honor.  
17      Kyle Kimpler from Paul, Weiss, Rifkind, Wharton &  
18      Garrison, on behalf of the Ad Hoc GIO Group.

19               I just wanted to quickly, if I could, respond to  
20      a few of the comments. You were asking about, What is  
21      going on in the current GIO adversary proceedings, how  
22      does that relate to the discovery that's being sought  
23      here?

24               I just wanted to correct the record on two  
25      points really quickly. There were a couple of

1 references I think by other Counsel that perhaps the  
2 Committee is representing bondholders or is  
3 representing GIO holders. That is not the case, and I  
4 think that is obvious by what you just heard, which is  
5 that they're actually looking to invalidate certain GIO  
6 bonds based on a Government issue.

7 That's obviously an issue that's not for today  
8 on the merits, but I would note that, as Mr. Despins  
9 just suggested, the Oversight Board has, in the current  
10 adversary proceeding going on between the GIO holders  
11 and the Oversight Board, raised all types of issues  
12 regarding the status of GIO debt, whether it is secured  
13 or whether it has priority, et cetera. They have not  
14 raised this issue. I will suggest that, that is a  
15 target is not a valid argument, and our position is  
16 that this would be nothing but a waste of money, to  
17 look into these issues.

18 THE COURT: Meaning the debt limit?

19 MR. KIMPLER: The debt limit issues, yes. I  
20 would assume the Board, in preparing all of their  
21 arguments, would have considered this one and has  
22 decided not themselves to bring it; and, therefore, we  
23 think it would be wasteful for the Committee to pursue  
24 that.

25 THE COURT: Okay.

1 MR. FRIEDMAN: Thank you, Your Honor.

2 Your Honor, it's Peter Friedman from O'Melveny.

3 I just wanted to make two quick points. The  
4 issue was raised, that last issue was raised  
5 pre-petition in the Lex Claims, which were subject to  
6 the automatic stay as a defense by the people who are  
7 in here this morning. The COFINA seniors did challenge  
8 the validity of some bond issuances, and so it's  
9 certainly lurking out there and a matter of --

10 THE COURT: Didn't I read it somewhere?

11 MR. FRIEDMAN: Subject to the automatic stay.  
12 And certainly we would be willing, as a party that will  
13 clearly be the recipient of discovery requests at GDB,  
14 to sit down with both Counsel for the Commonwealth and  
15 COFINA Agents and come up with a discovery schedule  
16 that involved -- in that matter as part of the overall  
17 matter that will be litigated between the parties.

18 You know, we'll probably have some of the same  
19 issues that have arisen already and have been before  
20 you with respect to deliberative process, et cetera,  
21 but we're certainly willing to do what we've done in  
22 the past, which is negotiate appropriate schedules and,  
23 you know, litigate in good faith where necessary and  
24 compromise where appropriate on discovery connected to  
25 a specific live controversy where both sides are

1 involved and we're not getting whipsawed.

2 Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. BIENENSTOCK: Your Honor, thank you.

5 Martin Bienenstock for the Oversight Board.

6 I just wanted to respond briefly to a few of the  
7 comments made in response to Your Honor's suggestion.  
8 First, as to the last comment by Paul-Weiss for the GIO  
9 holders, in the adversary proceedings that are pending,  
10 the current motion practice pertains to things that can  
11 be done on the face of the papers. I would not infer  
12 from that any decision to forego defenses such as debt  
13 limit, et cetera. It's simply too early.

14 But the important fact, Your Honor, is what the  
15 Committee said, which is basically that he'll take care  
16 of the investigation, see you all later. And  
17 Your Honor may not think that from the way it was  
18 portrayed, but that's what they were saying, and it's  
19 wrong.

20 I didn't spend time earlier responding to the  
21 mud that they threw into their papers because I didn't  
22 want to dignify it. But suffice it to say, it was mud.  
23 The Oversight Board members were screened by the White  
24 House, I'm talking about the Obama White House; they  
25 were appointed in August, 2016. As hard as they tried,

1       they could not come up with anything against any of  
2       these seven members other than some of them worked for,  
3       in prior years, some of the institutions involved.  
4       None of them, though, were on the Board's special  
5       committee, even though that would rightfully not  
6       disqualify them.

7               But the important thing for Your Honor to know  
8       is that all indications are that, if these  
9       investigations are going to create meaningful sunlight  
10      or create causes of action beneficial to the  
11      Commonwealth, the two most promising are Banco Popular  
12      and Santander, and there is no way that this Committee  
13      should lead that investigation. And what they've tried  
14      to do is to throw mud as a reason to displace the Board  
15      that Congress put there to lead that investigation.

16             All that said, we think Your Honor's suggestion  
17      was the right one. We will have an investigator out  
18      front for this process. He should meet with both  
19      Committees and come back to Your Honor and report as to  
20      whether they could agree on a protocol going forward or  
21      what the snags are.

22             THE COURT: And what kind of timeframe do you  
23      think would be reasonable for that?

24             MR. BIENENSTOCK: I think what Your Honor said  
25      is right. The Board can appoint someone next week, and

1 Your Honor said give them a week to read the papers.  
2 So, if we come back here in three weeks, that should be  
3 perfect.

4 THE COURT: And do you have any comment on  
5 whether the COFINA-Commonwealth discovery should go  
6 forward?

7 MR. BIENENSTOCK: Oh, it absolutely should go  
8 forward, and the -- as Your Honor knows, the General  
9 Creditors' Committee, the UCC, is the Commonwealth  
10 Agent and should go forward. I disagree entirely with  
11 the Committee and agree with Your Honor about being  
12 able to use Rule 2004 against third-party witnesses in  
13 that litigation.

14 As Your Honor can imagine, if the Commonwealth  
15 Agent, as a Plaintiff in that litigation, notices  
16 discovery under Rule 2004, number one, the other  
17 parties to that litigation aren't even invited to show  
18 up; number two, except for contradictory statements,  
19 that discovery cannot even be used in the adversary  
20 proceeding.

21 So, the only thing the Commonwealth Agent can do  
22 is take classic discovery under the Federal Rules of  
23 Civil Procedure, not under Rule 2004. If it tries to  
24 use 2004, number one, the witness will object; number  
25 two, the other parties will object, and so what was

1 said about they're allowed to do it for third-party  
2 witnesses is demonstratively wrong.

3 THE COURT: And what's the schedule of this --  
4 I'm sorry. I just don't remember the details of your  
5 stipulation of how COFINA-Commonwealth is going  
6 forward.

7 MR. BIENENSTOCK: Well, the schedule was that,  
8 by a date that's coming up within I think the next week  
9 or two, the litigation has to be commenced, and it has  
10 to be orchestrated so that a decision can be rendered  
11 by December 15 unless Judge Swain sends it for cause.

12 THE COURT: So, the litigation is expected to be  
13 commenced soon?

14 MR. BIENENSTOCK: Very soon.

15 THE COURT: Very soon. Okay.

16 MR. BIENENSTOCK: Thank you.

17 MR. LEVIN: I'd like to answer two or maybe two  
18 and a half questions that the Court asked. You'll see  
19 why it's a half.

20 The first one is the statute of limitations  
21 issue. When it comes to objections to claims, the  
22 statute of limitations issue is not relevant because a  
23 claim can be objected to that it's --

24 THE COURT: Right.

25 MR. LEVIN: -- not enforceable at any time, as

1 provided in the Code. So, it's not like an affirmative  
2 cause of action against a third party where you worry  
3 about a statute of limitations.

4 The other, as to affirmative causes of action  
5 against third parties, Section 108 of the Bankruptcy  
6 Code applies in PROMESA, and that provides a two-year  
7 extension of any statute that hasn't expired by the  
8 petition date. So, in terms of getting the  
9 investigation done, we've got until May, 2019, to bring  
10 causes of action. I think none of us in this room  
11 wants to take that long, but at least expiring statute  
12 of limitations is not a problem against third parties.  
13 That's one question.

14 The second question, How does the COFINA  
15 litigation discovery proceed at the same time as the  
16 2004? Mr. Bienenstock addressed that to a degree.  
17 There is a tentative draft schedule. Mr. Bienenstock  
18 is correct, the stipulation contemplates a decision by  
19 December 15 by the Court. The draft schedule  
20 contemplates discovery over the next 60 days.

21 The Committee, which is the general -- the  
22 General Committee, which is going to be the  
23 Commonwealth Agent -- is the Commonwealth Agent is  
24 going to be very busy with that discovery, getting a  
25 tremendous amount of information relating to the COFINA



1 bonds and their issuance and their Constitutional  
2 validity and all of those matters.

3 If Your Honor is looking for one bite to take  
4 that's digestible, that certainly is, for the next 60  
5 or so days, while that discovery proceeds, without  
6 needing to expand the Committee's duties into 2004  
7 exams where the Oversight Board's investigation's  
8 counsel will be up and running long before that time,  
9 and the Committee will have plenty to keep it busy  
10 between now and then.

11 Those are the two and a half questions.

12 MR. DESPINS: Your Honor, the case I couldn't  
13 remember two hours ago was *WaMu*. In that case, the  
14 Court held that the argument that Mr. Bienenstock made  
15 that, when there's a pending proceeding, you can't use  
16 2004, only works for the people who are the Defendants  
17 in that litigation. That's the *WaMu* case. It's cited  
18 in our reply.

19 As to the Retiree Committee, Your Honor, you  
20 have to look at the objection they filed. The  
21 objection said, Oh, we don't like the main Committee to  
22 do this. We have asked them to be co-Plaintiffs, if  
23 you will, and we said no, there's enough people, you  
24 know, involved in this. We'll give you everything we  
25 get at the same time and all that.

1           And everything that they said since then has  
2       been in furtherance of that, which is I think they  
3       would be bizarrely happy if you denied the motion  
4       because that means that our Committee would not take  
5       the lead on this, and that's -- everything they're  
6       doing has to be seen through that prism.

7           THE COURT: Well, that's involving a level of  
8       negotiation that's actually beyond --

9           MR. DESPINS: Understood. But just look at the  
10      objection they filed, and you'll see what this is all  
11      about.

12          THE COURT: This is what I want to happen: I  
13      want the COFINA-Commonwealth litigation to be -- to go  
14      forward as soon as possible and to be coordinated  
15      between the adversary proceeding and any extra in the  
16      2004 investigation of those issues.

17          I want the Board's investigator to coordinate  
18      with -- to meet and confer with the Creditors'  
19      Committee to determine whether or not there are a  
20      protocol to go forward and coordinated efforts and  
21      whether or not there are certain areas that should be  
22      spun off to be pursued, for the lead to be either the  
23      Creditors' Committee or the investigator. You know,  
24      are there certain areas that should be divided among  
25      them, and is there a way to coordinate the

1 investigation?

2 That also requires for me some timeline of how I  
3 see the investigation going. In my head, this has to  
4 be phased somehow, and I don't know the appropriate way  
5 to do that. I'm going to put that on the list of  
6 things that should be discussed between the  
7 investigator and the UCC, but if there's no agreement  
8 on any of these, you can each tell me where you're  
9 standing, and then I'll decide whether or not I require  
10 coordination or not, but the report to me also has to  
11 indicate whether or not discovery is being done in  
12 connection with major adversary proceedings that this  
13 would run into or not.

14 Does this make enough sense, or do I have to say  
15 it again?

16 MR. LEVIN: No.

17 THE COURT: I will put it into something, or can  
18 I ask you guys to put it into something? What's the  
19 best way to do this? Do you want me to enter an order  
20 that explains this, or should I ask I guess both of you  
21 to submit me a proposed order of this agreement?  
22 Everyone's staring at me.

23 MR. DESPINS: I'm happy to work with  
24 Mr. Bienenstock.

25 THE COURT: Can you do that?

1 MR. BIENENSTOCK: Sure.

2 MR. LEVIN: Your Honor, in your reference to  
3 what needs to be done in terms of coordinating, we'd  
4 ask that the Retiree Committee be included with the  
5 General Committee in that process and, obviously, the  
6 COFINA Agent as well.

7 THE COURT: The COFINA Agent needs to confer  
8 with the Committee -- right? -- so that's a given.

9 MR. FRIEDMAN: And we're actually in the process  
10 of that already, Your Honor.

11 THE COURT: So that's a given.

12 I think, for the Retirees' Committee, I have no  
13 objection to you participating with them, but I think  
14 that the dispute here is between the Board and the UCC  
15 because you've agreed to either go with one or the  
16 other, so...

17 MR. LEVIN: Well, true, Your Honor. But if  
18 you're in effect authorizing the General Committee to  
19 bring this discovery, then you're encouraging us to  
20 file a singular motion so we get similar status, which  
21 I don't think is constructive to the process, that's  
22 why we didn't do it, but that's why we should be at the  
23 table.

24 THE COURT: I personally think you're very nice,  
25 I'd love to have you by the table, but --

1 MR. LEVIN: Thank you, Your Honor.

2 THE COURT: -- I don't want to add another  
3 requirement here. The first thing I want is a proposed  
4 order that says that the parties will meet and confer  
5 and the like. When it comes down to then having the  
6 meeting between the Board and the UCC, I think that you  
7 have -- the retirees have indicated that the Board is  
8 really -- you're willing to go to with the Board's  
9 description, so if the parties cannot reach an  
10 agreement and they file with me their disputed  
11 positions, you can file something --

12 MR. LEVIN: Thank you, Your Honor.

13 THE COURT: -- okay? But you don't need to be  
14 part of yet another late night phone call.

15 MR. LEVIN: We will coordinate with the Board on  
16 that, then.

17 THE COURT: Okay. So, I guess what I'm saying  
18 is I would like a proposed order by the -- what's  
19 today, Tuesday? -- so by -- in the next couple of days,  
20 48 hours. You're not flying far? Everybody's flying  
21 local. Within three weeks, where does that take us?

22 THE CLERK: September 12.

23 THE COURT: So, by September 12th, I'd like a  
24 status report. I would prefer a joint status report  
25 between the Board and the Committee on whether or not

1       you believe an agreement can be reached or has been  
2       reached or whether or not you think I need to rule  
3       further. And if there are areas in dispute that you  
4       would like me to focus on, you can do that.

5               I'm not ruling on the motion; I'm continuing the  
6       motion. Okay?

7               MR. DESPINS: Understood.

8               THE COURT: Everybody's kind of nodding, so I'm  
9       going to say okay.

10              MR. LEVIN: Yes, understood, Your Honor.

11              THE COURT: I'm going to get off the bench  
12       before I cause any more problems.

13              MR. FRIEDMAN: Your Honor, we reserve our rights  
14       with respect to a proposed form of order.

15              THE COURT: Say that again.

16              MR. FRIEDMAN: We just wanted to reserve our  
17       rights on the record to any proposed form of order and  
18       ask for the right to be heard in the future with  
19       respect to cost issues, et cetera.

20              THE COURT: No, this isn't waiving anybody's  
21       rights.

22              MR. FRIEDMAN: Thank you, Your Honor.

23              THE COURT: And if you don't reach an agreement,  
24       maybe in the status report, you can also -- I will  
25       determine whether or not there should be an objection

1 period, depending on how much everybody has spelled out  
2 their positions or not.

3 MR. FRIEDMAN: Thank you, Your Honor.

4 THE COURT: Okay? All right. Now should I go?  
5 I'm going to go.

6 Thank you all.

7 THE CLERK: Court is in recess.

8 (Adjourned, 3:16 p.m.)  
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C E R T I F I C A T I O N

I, Debra D. Lajoie, RPR-FCRR-CRI-RMR, do  
hereby certify that the foregoing pages are a true and  
accurate transcription of my stenographic notes in the  
above-entitled case.

/s/ Debra D. Lajoie

8/23/17